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TRIAL

OF

DAVID M. FURCHES,

Now Chief Justice, and Formerly
Associate Justice,

AND

ROBERT M. DOUGLAS,

Associate Justice of the Supreme Court
of North Carolina,

ON

IMPEACHMENT

BY THE

HOUSE OF REPRESENTATIVES

FOR

HIGH CRIMES AND MISDEMEANORS.

Published by Order of the General Assembly.

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GEORGE ROUNTREE	Wilmington, N. C.
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COUNSEL FOR THE MANAGERS.

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JAMES H. POU	Raleigh, N. C.
CHARLES M. BUSBEE	Raleigh, N. C.
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CHAS. M. COOKE	Louisburg, N. C.
J. LINDSAY PATTERSON	Winston, N. C.
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TRANSACTIONS

OF THE

HOUSE OF REPRESENTATIVES

In Connection with the

MEASURES OF IMPEACHMENT

OF

DAVID M. FURCHES,

Now Chief Justice, and Formerly
Associate Justice,

AND

ROBERT M. DOUGLAS,

Associate Justice, of the Supreme Court
of North Carolina.

By Mr. CRAIG: H. R., 710. Resolution relating to the action of the Auditor, the Treasurer and two Judges of the Supreme Court, in the case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Referred to the Committee on the Judiciary.

House Journal, January 31st, 1901.

Mr. ALLEN, of Wayne, for the Committee on the Judiciary: H. R. 710. Resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer, with a favorable report.

On motion of Mr. Allen the resolution is made the special order for next Thursday at 11 o'clock, and the bill, report and evidence is ordered printed.

House Journal, February 8th, 1901.

SPECIAL ORDER.

The special order being the consideration of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Mr. EBBS sends forward a minority report of the Committee on the Judiciary.

Mr. CONNOR sends forward the following substitute:

"Resolved, by the House of Representatives, the Senate concurring, That in issuing a mandamus to the State Auditor and the State Treasurer, in case of Theophilus White against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, lately pending before the Supreme Court, a majority thereof concurring, assumed authority and power not conferred by the Constitution and laws of the State, but in derogation thereof."

Mr. ALLEN, of Wayne, moves to amend the substitute offered by Mr. Connor, by adding the following: "That said Judges, David M. Furches, formerly Associate Justice, and now Chief Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court, be impeached of high crimes and misdemeanors in office."

Pending the consideration of this bill, the House, on motion of Mr. Allen, of Wayne, takes a recess until 4 o'clock this afternoon.

Afternoon Session.

The House meets this afternoon at 4 o'clock in pursuance to recess, and is called to order by Mr. Gattis, Speaker *pro tem.*

The House resumes the consideration of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Mr. WHITAKER, of Guilford, offers a substitute for the amendment offered by Mr. Allen, of Wayne, as follows:

"That the Senate and House of Representatives do most solemnly and firmly protest against the said action of said Court as an invasion of the powers of the Legislative Department of the government and setting a precedent dangerous to the constitutional rights of the people."

Pending the discussion of this bill, the House, on motion of Mr. Rountree, adjourns to meet to-morrow morning at 10 o'clock.

From House Journal. February 14th, 1901.

The House then resumes the discussion of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Pending the discussion of this resolution the House, on motion of Mr. Allen, of Wayne, takes a recess to meet this afternoon at 3:30 o'clock.

AFTERNOON SESSION.

The House meets pursuant to adjournment at 3:30 o'clock, and is called to order by Mr. Gattis, Speaker *pro tem.*

The House then resumes the discussion of H. R. 710, resolution relating to the action of the Auditor and the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Pending the discussion of this resolution, the House, on motion of Mr. Allen, of Wayne, adjourns to meet to-morrow morning at 9:30 o'clock.

From House Journal, February 15th, 1901.

The House resumes the consideration of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Pending the discussion on this resolution, on motion of Mr. Allen, of Wayne, the House takes a recess until 3:30 o'clock this afternoon.

AFTERNOON SESSION.

The House meets pursuant to recess at 3:30 o'clock, and is called to order by Mr. Gattis, Speaker *pro tem.*

The House resumes the consideration of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in case of Theophilus White against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

On motion of Mr. Craig, of Buncombe, the consideration

of the resolution is displaced and made a special order for 10 o'clock a. m., Monday, February 18th.

From House Journal, February 16th, 1901.

The House resumes the discussion of H. R. 710, resolution relating to the action of the Auditor, the Treasurer, and two Judges of the Supreme Court, in the case of Hal W. Ayer, Auditor, and W. H. Worth, Treasurer.

Mr. BLYTHE, of Henderson, gives notice that he will file a written protest against the passage of the resolution.

Mr. CRAIG, of Buncombe, calls the previous question. Call sustained.

Mr. BLYTHE sends forward his protest, which is, on motion of Mr. Allen, of Wayne, referred to the Committee on Rules.

Mr. WHITAKER, of Guilford, withdraws his substitute for the amendment offered by Mr. Allen, of Wayne, to the substitute offered for the original resolution by Mr. Connor.

Mr. ALLEN, of Wayne, withdraws his amendment to the substitute offered by Mr. Connor.

The question then recurs upon the substitute offered by Mr. Connor, of Wilson.

Upon his substitute, Mr. Allen, of Wayne, demands the ayes and noes. Call sustained.

The substitute is lost by the following vote:

Those voting in the affirmative are: Messrs. Connor, Fields, Gaither, Long, McLean, Morris, Nash, Reinhardt, Simms, Thompson, White of Halifax, Willard—12.

Those voting in the negative are: Messrs. Alexander, Allen of Wayne, Ardrey, Barco, Barnhill, Beasley, Beddingfield, Benbow, Blalock, Blount, Blythe, Bradsher, Brim, Brittain, Burlison, Burnett, Calloway, Carr, Carraway, Carlton, Carson, Coleman, Collins, Craig, Curtis, Daniels of Warren, Dean, Dees, Duncan, Ebbs, Garrett, Gattis,

Graham, Green, Hall, Harris, Hayes, Hoey, Isbell, Jenkins, Lane, Lawrence, Little, MacKethan, Mann, Mastin, Mauney, McCulloch, McFarland, McIntosh, McIver, Morgan, Morphew, Nichols, Nicholson, Oliver, Owen, Owens, Page, Parker, Patterson, Payne, Pearce, Petree, Roberson, Robinson, Ross, Rothrock, Russell, Seawell, Shannonhouse, Sheets, Smith, Spainhour, Stevenson, Stubbs, Taylor, Watts, Weaver, Welch, Whitaker of Forsyth, White of Jones, Wilson, Winston, Yarborough, Zachary—85.

At the close of the call of the roll the following pairs are announced:

Mr. Brittain with Mr. Baldwin; Mr. Pearson with Mr. Whitaker of Guilford; Mr. Wright with Mr. Hood; Mr. Ellen with Mr. Richardson; Mr. Daniels of Vance, with Mr. Roberson; Mr. Mason with Mr. Duls.

The first-mentioned gentlemen, if present, would have voted in the affirmative, the last mentioned in the negative.

The question then recurs upon the original resolution, offered by Mr. Craig.

Mr. Mastin demands the ayes and noes, and the call is sustained.

Messrs. Simms and Willard give notice that they desire to explain their votes.

The resolution is adopted by the following vote:

Those voting in the affirmative are: Alexander, Allen of Wayne, Ardrey, Barco, Barnhill, Beasley, Beddingfield, Blalock, Blount, Bradsher, Carr, Carraway, Carlton, Craig, Curtis, Daniels of Warren, Dees, Fields, Garrett, Gattis, Graham, Green, Hall, Harris, Hayes, Hoey, Jenkins, Lane, Lawrence, Little, MacKethan, Mann, Mauney, McCulloch, McIver, Morgan, Morphew, Nichols, Nicholson, Oliver, Owens, Pearce, Robinson, Ross, Rothrock, Russell, Seawell, Shannonhouse, Shelton, Simms, Smith, Spainhour, Taylor, Thompson, Welch, Whitaker of Forsyth, White of Halifax, White of Jones, Willard, Wilson, Winston, Zachary—62.

Those voting in the negative are: Benbow, Blythe, Brim,

Burlison, Burnett, Calloway, Carson, Coleman, Collins, Connor, Dean, Duncan, Ebbs, Gaither, Isbell, Long, Mastin, McFarland, McIntosh, McLean, Morris, Nash, Owen, Page, Patterson, Payne, Petree, Reinhardt, Sheets, Stevenson, Stubbs, Watts, Weaver—33.

At the close of the roll the following pairs are announced: Mr. Brittain with Mr. Baldwin; Mr. Pearson with Mr. Whitaker of Guilford; Mr. Rountree with Mr. Yarboro; Mr. Wright with Mr. Hood; Mr. Ellen with Mr. Richardson; Mr. Daniels of Vance, with Mr. Roberson; Mr. Mason with Mr. Duls; Mr. Stuart with Mr. Parker.

Those first mentioned, if present, would have voted in the affirmative, the last mentioned, if present, would have voted in the negative.

From House Journal, February 18th, 1901.

Mr. HAYES, of Chatham, introduces the following resolution, being H. R. 1354, which is adopted:

"*Resolved,* That the House do now proceed to elect by ballot nine managers, members of the House of Representatives, who shall prepare and present to this House articles of impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court, and who shall conduct such impeachment at the bar of the Senate, with power to send for persons, papers and records, and to take testimony under oath, with the further power and authority to associate with them in the preparation of such articles, and in the conduct of said impeachment, other counsel learned in the law."

By Mr. HAYES, of Chatham: H. R. 1354. Resolution to elect managers to prepare and present articles of impeachment against David M. Furches and Robert M. Douglas. Placed on the Calendar. Resolution adopted.

On motion of Mr. Allen, the election of the committee is made a special order for 1 o'clock p. m.

From House Journal, February 19th, 1901.

The special order being the election of nine managers to prepare and present articles of impeachment against David M. Furches and Robert M. Douglas, the Speaker announces that nominations are in order.

Mr. Hoey, of Cleveland, nominates Messrs. Allen, of Wayne; Craig of Buncombe; Rountree, of New Hanover; Graham, of Granville; Hayes, of Chatham; Spainhour, of Burke; Nicholson, of Beaufort; Shannonhouse, of Mecklenburg, and Seawell, of Moore.

The Speaker appoints as tellers, Messrs. Hoey, of Cleveland, and Benbow, of Yadkin.

Upon a call of the roll the following gentlemen voted for Messrs. Allen of Wayne, Craig, Rountree, Graham, Hayes, Spainhour, Nicholson, Shannonhouse and Seawell:

Mr. Speaker, Messrs. Alexander, Allen of Columbus, Ardrey, Barco, Barnhill, Beasley, Beddingfield, Blalock, Blount, Bradsher, Brittain, Carraway, Carlton, Connor, Curtis, Daniels of Vance, Daniels of Warren, Dees, Duls, Fields, Gaither, Garrett, Gattis, Hall, Harris, Hoey, Jenkins, Lane, Lawrence, Little, Long, MacKethan, Mann, Mauney, McIver, McLean, Morgan, Morphew, Morris, Nash, Oliver, Page, Parker, Patterson, Pearce, Reinhardt, Richardson, Roberson, Robinson, Rothrock, Russell, Shelton, Simms, Stevenson, Taylor, Thompson, Ward, Watts, Welch, Whitaker of Forsyth, White of Jones, Willard, Winston, Yarborough, Zachary.

Mr. Graham votes for Messrs. Allen of Wayne, Craig, Rountree, Hayes, Spainhour, Nicholson, Shannonhouse, Seawell and Connor.

REPORT OF TELLERS.

We, the tellers appointed to canvass the vote regarding the election of managers for the impeachment trial, report to the House that the following gentlemen received the number after their names as managers on the part of the House to conduct the impeachment trial of Chief Justice David M. Furches, and Associate Justice Robert M. Douglas, of the Supreme Court of North Carolina:

Allen, of Wayne, 67 votes; Craig, of Buncombe, 67 votes; Rountree, of New Hanover, 67 votes; Graham, of Granville, 66 votes; Hayes, of Chatham, 67 votes; Spainhour, of Burke, 67 votes; Nicholson, of Beaufort, 67 votes; Shannonhouse, of Mecklenburg, 67 votes; Seawell, of Moore, 67 votes; Connor, of Wilson, 1 vote.

The last vote being cast by Mr. Graham.

This the 19th day of February, 1901.

(Signed) CLYDE R. HOEY,
FRANK B. BENBOW,
Tellers of the House.

From House Journal, February 19th, 1901.

The Chair announces as the committee to inform the Senate of the action taken by the House on the resolution for the impeachment of David M. Furches and Robert M. Douglas, Messrs. Winston, Ardrey, Blount, Zachary, Carlton.

From House Journal, February 19th, 1901.

Mr. THOMPSON, of Onslow, introduces the following resolution, which was adopted, being H. R. 1369:

"*Resolved,* That a message be sent to the Senate informing that honorable body that at the hour of 1:30 p. m., of this

day, a committee of the House will appear at the bar of the Senate and in the name of the House of Representatives and of all the good people of North Carolina, impeach David M. Furches, late Associate Justice, and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office.

From House Journal, February 20th, 1901.

The following order is announced by the Chair:

"HOUSE OF REPRESENTATIVES, February 20, 1901.

Messrs. Winston, of Bertie; Ardrey, of Mecklenburg; Zachary, of Transylvania; Blount, of Washington; Carlton, of Duplin.

"GENTLEMEN:—In accordance with resolutions which have passed the House, a copy of which is hereby handed you, you are hereby appointed to appear at the bar of the Senate in the name of the House of Representatives and all the good people of North Carolina, to impeach David M. Furches, late Associate Justice, now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office.

(Signed) "WALTER E. MOORE,
"Speaker of the House of Representatives."

The following report being endorsed on the order:

"We performed the duty imposed by this order at 1:30 p. m., on the 20th day of February, A. D. 1901.

"FRANCIS D. WINSTON,
"W. E. ARDREY,
"R. H. ZACHARY,
"THOS. W. BLOUNT,
"D. L. CARLTON,
"Committee."

The committee, in obedience to the above order, proceeded to the Senate with the resolution, and upon returning to the bar of the House presented the following report:

"Mr. Speaker:—In obedience to the order of the House, we this day proceeded to the bar of the Senate, and in the name of this body, and of all the people of the State of North Carolina, we impeached, as we were directed to do, David M. Furches, late Associate Justice, and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office; and we demanded that the Senate should take order to make them appear before that body to answer for the same, and announced to the Senate that the House would soon present articles of impeachment and make good the same."

To which the response was:

"The Senate has received the message and will consider the same and take proper action thereon."

(Signed) "Francis D. Winston,
"W. E. Ardrey,
"R. H. Zachary,
"Thos. W. Blount,
"D. L. Carlton."

From House Journal, February 20th, 1901.

Mr. CONNOR, from the Committee on Rules, reports the protest of the minority members of the House, introduced by Mr. Blythe, against the passage of resolution to impeach Chief Justice David M. Furches and Associate Justice Robert M. Douglas, and the same is ordered spread upon the Journal of the House.

The following being a copy of protest of the minority members:

To the Honorable Speaker and Gentlemen of the General Assembly.

"We, the undersigned, respectfully request to enter this our protest against the passage of the resolution to impeach Chief Justice David M. Furches and Associate Justice Robert M. Douglas, and ask that same be printed in the Journal of the House of Representatives.

"1. It is the province of the Legislature to enact laws, and the province of the courts to interpret, construe and apply the laws. *Robinson v. Barfield,* 6 N. C., 390, etc.

"2. The power to interpret, construe and apply the laws is conferred by the Constitution, therefore any act of the Legislature attempting to prevent the courts performing this function is void.

"3. The decision in the case of *White v. Hill,* 125 N. C., . . , giving White the remainder of a term of office to which he had been appointed, the duties and salary being continued, was in accordance with the unanimous opinion of the Supreme Court in *Hoke v. Henderson,* 15 N. C., 1, and upheld by the present Court in *Wood v. Bellamy,* 120 N. C., ..., and *State v. Southern R. R.,* 125 N. C., 666, upholding *Abbott v. Beddingfield,* 125 N. C., 256.

"4. We can not conclude that since the Justices have followed a long line of judicial decisions that they have, in any respect, acted corruptly.

"5. That the proceeding against the Auditor is not, in our opinion, a claim against the State, within the prohibition of the Constitution. A claim of this kind is one against the State for which the Legislature has made no provision or appropriation. *Garner v. Worth,* 122 N. C., 250, and *Arendell v. Worth.* In this case, *White v. Auditor,* a special and particular fund is provided for a special and particular industry, for this special and particular purpose. Laws 1897, chapter 13, and Laws 1899, chapter 19.

"The Superior and Supreme courts have found that the

amount be paid this particular officer by the Treasurer, therefore nothing more than a ministerial duty is left to be performed by the Auditor and Treasurer. *Coston v. Ellis,* 52 N. C., 545; *Marbury v. Madison,* 1 Branch, 64, etc., and *Bailey v. Caldwell,* 68 N. C., 472, etc.

"6. The evidence taken by the sub-Judiciary Committee, of itself *ex parte,* in substance and manner of its production, and as stated by the gentlemen of the sub-Judiciary Committee, the strongest that the committee could obtain, is, although uncontradicted and unexplained, not of itself sufficient to warrant this House in adopting any resolution of censure or impeachment.

"For the reasons set forth, we deliberately and solemnly, yet respectfully protest against the passage of either of these resolutions.

(Signed) "O. V. F. Blythe,
"I. N. Ebbs,
"J. W. McFarland,
"C. M. Sheets,
"R. J. Petree,
"C. J. Carson,
"W. H. Calaway,
"W. G. Payne,
"John Burnett,
"H. D. Dean,
"W. M. McIntosh,
"R. T. Coleman,
"Hiram Weaver,
"Jno. B. Isbell,
"E. O. Mastin,
"F. B. Benbow,
"Sam. G. Brim,
"T. E. Owen,
"N. G. Duncan,
"J. E. Burlison."

From House Journal, February 21st, 1901.

On Saturday, February 23, 1901, Mr. Winston gives notice that the managers heretofore elected to prepare articles of impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice, will appear before the bar of the House at the hour of 12 o'clock to-day and present said articles of impeachment.

The hour of 12 o'clock m. having arrived, the Board of Managers heretofore elected appear before the bar of the House and through their Chairman, Mr. Allen, of Wayne, present articles of impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice. (See Articles of Impeachment, Senate Proceedings, pages xxxi to xliv.

On motion of Mr. Gattis, the House resolves itself into a committee of the whole to consider the above articles.

House in committee of the whole.

Mr. GATTIS in the Chair.

On motion of Mr. Allen, of Wayne, the articles of impeachment are taken up, read and acted on *seriatim,* article by article.

Article 1 is read and, on motion of Mr. Gattis, is adopted.

Article 2 is read and, on motion of Mr. Zachary, is adopted.

Article 3 is read and, on motion of Mr. Curtis, is adopted.

Article 4 is read and, on motion of Mr. Smith, is adopted.

Article 5 is read and, on motion of Mr. Zachary, is adopted.

On motion of Mr. Rountree, the articles of impeachment are adopted as a whole.

On motion of Mr. Winston, the committee of the whole rises and reports to House, through its chairman, Mr. Gattis, its action on the proceeding, as follows:

"Mr. Speaker:—The House having resolved itself into a committee of the whole for the purpose of considering the

articles of impeachment against David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice, beg leave to report that the committee of the whole has had the same under consideration, and recommend that the articles of impeachment against said David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice, which were referred to the committee, be adopted by the House of Representatives."

On motion of Mr. Rountree, the rules are suspended and the reading of the articles of impeachment is dispensed with.

On the adoption of the articles of impeachment, Mr. Mastin demands the ayes and noes. Call sustained.

Messrs. Brittain and Connor give notice that they desire to explain their votes.

Upon a call of the roll, the articles of impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice, are adopted by the following vote:

Those voting in the affirmative are: Allen of Wayne, Ardrey, Bannerman, Barco, Barnhill, Beasley, Blalock, Blount, Bradsher, Brittain, Carraway, Craig, Curtis, Daniels of Vance, Daughtridge, Ellen, Fields, Garrett, Gattis, Graham, Harris, Hayes, Jenkins, Lane, Lawrence, MacKethan, Mann, Mauney, McCulloch, McIver, Morgan, Morphew, Nicholson, Owens, Pearce, Pearson, Robinson, Rothrock, Rountree, Seawell, Shannonhouse, Shelton, Simms, Smith, Stewart, Taylor, Thompson, Ward, Welch, Whitaker of Forsyth, White of Halifax, White of Jones, Willard, Wilson, Winston, Zachary—56.

Those voting in the negative are: Baldwin, Benbow, Blythe, Brim, Burlison, Burnett, Carson, Coleman, Connor, Dean, Duncan, Ebbs, Gaither, Hood, Isbell, Mastin, McFarland, McIntosh, McLean, Morris, Owen, Page, Patterson, Payne, Petree, Reinhardt, Sheets, Stevenson, Watts, Weaver, Whitaker of Guilford, Yarborough—33.

Mr. Daughtridge gives notice that if he had been present

when the resolution of impeachment was voted on, he would have voted in the affirmative.

By unanimous consent, Mr. Winston introduces H. R. 1609:

"*Resolved,* That a message be sent to the Senate, informing that honorable body that the House of Representatives have adopted specific articles of impeachment against David M. Furches, late Associate Justice, and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office, and that the House has elected the following gentlemen managers, to conduct such impeachment: Messrs. Allen of Wayne, Craig, Rountree, Graham, Hayes, Spainhour, Nicholson, Shannonhouse and Seawell, and have directed the said managers to carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of their impeachment against said David M. Furches and Robert M. Douglas as aforesaid; and that the Senate is respectfully asked to name the hour when such articles of impeachment shall be presented to the Senate by the managers heretofore elected by this House."

The resolution is adopted and a message is sent the Senate in accordance therewith.

A message is received from the Senate as follows:

"SENATE CHAMBER, February 23, 1901.

"MR. SPEAKER:—It is ordered that a message be sent to the House of Representatives informing that honorable body that the Senate will receive the managers appointed by the House and the articles of impeachment to-day at 2:15 o'clock.

(Signed) "A. J. MAXWELL,
"*Clerk.*"

Mr. WINSTON, of Bertie, introduced the following resolution, being H. R. 1614:

"WHEREAS, The Senate has notified the House of Representatives that the Senate will receive the articles of impeachment against David M. Furches and Robert M. Douglas at the hour of 2:15 o'clock p. m., this day;

"*Resolved*, That the House of Representatives attend the managers of such impeachment, heretofore elected by the House of Representatives, to the Senate Chamber to-day at 2:15 p. m., in the following order:

"First. The managers, two and two, headed by their chairman.

"Second. The Speaker of the House of Representatives.

"Third. The principal and assistant clerks.

"Fourth. The members of the House of Representatives, two and two.

"*Resolved*, That any member desiring it, be excused from attending the managers."

The resolution is adopted and the House, preceded by the managers, proceeds to the bar of the Senate and there are presented by Mr. Allen, chairman of the Board of Managers, the articles of impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of North Carolina, which are read, and the House returns to the Chamber of the House of Representatives.

From House Journal, February 23rd, 1901.

A message is received from the Senate as follows:

"SENATE CHAMBER, February 25, 1901.

"MR. SPEAKER:—It is ordered that a message be sent to the House of Representatives informing that honorable body

that the Senate will organize as a Court of Impeachment at 12:30 o'clock to-day.

"Respectfully, A. J. MAXWELL,
"Clerk."

From House Journal, February 25th, 1901.

A message is received from the Senate as follows:

"SENATE CHAMBER, February 25, 1901.

"MR. SPEAKER:—It is ordered that a message be sent to the House of Representatives informing that honorable body that the Senate is organized for the trial of impeachment of David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, and is ready to receive the managers of impeachment at its bar.

"Respectfully, (Signed) A. J. MAXWELL,
"Clerk."

From House Journal, February 25th, 1901.

H. R. 2112, introduced by Mr. Allen, of Wayne, which is placed on the Calendar and adopted.

H. R. 2112, resolution for adoption of replication to the answer to the Articles of Impeachment. The language of the said resolution being as follows:

"*Resolved by the House of Representatives,* That the following replication of the House of Representatives to the joint and several answer of David M. Furches, now Chief Justice, and formerly Associate Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, to the Articles of Impeachment exhibited against them by this House, be adopted; and that a properly certi-

fied copy thereof be signed by the Speaker and Clerk of this House, and furnished the Managers heretofore appointed to conduct the said impeachment, with directions to present and file the same in the Senate, sitting as a court for the trial of impeachment."

REPLICATION.

"Replication by the House of Representatives of the State of North Carolina to the joint and several answer of David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Carolina, to the Articles of Impeachment exhibited against them by the House of Representatives.

"The House of Representatives of the State of North Carolina have considered the joint and several answer of the said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Carolina, to the several articles of impeachment against them by the House of Representatives, exhibited in the name of themselves and of all the people of the State of North Carolina, and reserving to themselves all advantage of exception to the many evasions, irrelevancies, the argumentativeness and the insufficiency of said answer to each and all of the several articles of impeachment exhibited against said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Carolina, do deny each and every averment in said joint and several answer, or any or either of them, which denies or traverses the acts, intents, crimes or misdemeanors charged against said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Caro-

lina, in the said articles of impeachment, or either of them; and for replication to said joint and several answer, do say that the said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Carolina, are guilty of high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

"This is to certify the foregoing is a true copy of the resolution and replication adopted by the House of Representatives of North Carolina on this the 8th day of March, 1901.

(Signed) "WALTER E. MOORE,
"Speaker of the House of Representatives.
"BREVARD NIXON,
"Principal Clerk of the House of Representatives."

RESOLUTION concerning the sitting of the Senate as a Court of Impeachment, being H. R. 2250, adopted March 14, 1901, introduced by Mr. Smith, of Gates, and adopted March 14, 1901:

"Resolved by the House of Representatives, That the consent of the House of Representatives be and is hereby given that the Senate may sit as a Court of Impeachment after the adjournment of the General Assembly."

Preliminary Proceedings

IN THE

SENATE

ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES OF DAVID M. FURCHES AND ROBERT M. DOUGLAS, OF HIGH CRIMES AND MISDEMEANORS.

SENATE CHAMBER, February 20, 1901.

IMPEACHMENT PROCEEDINGS.

A committee from the House of Representatives, composed of Messrs. Winston, Ardrey, Blount, Zachary and Carlton, appeared at the bar of the Senate, and Mr. Winston, speaking for the committee, says:

"MR. PRESIDENT AND SENATORS:—We are directed by the House of Representatives to convey to you this message of great moment.

"After long and patient consideration, by pronounced majority, that branch of this General Assembly declares that David M. Furches, late Associate Justice and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, in violation of the letter and spirit of the Constitution, and in defiance of the plain statutory law of the State, have usurped powers subversive of the rights of the legislative department of our State Government.

"For this misconduct it declares that these officers be impeached of high crimes and misdemeanors in office. In obedience to the duty imposed upon us, we now present to your honorable body certain resolutions relating to such impeachment:

RESOLUTION RELATING TO THE ACTION OF THE AUDITOR, THE TREASURER, AND TWO JUDGES OF THE SUPREME COURT, IN CASE OF THEOPHILUS WHITE AGAINST HAL W. AYER, AUDITOR, AND W. H. WORTH, TREASURER.

WHEREAS, The Constitution of North Carolina, Art. IV, section 9, declares: "The Supreme Court shall have original jurisdiction to hear all claims against the State, but its decisions shall be merely recommendatory. No process in the nature of execution shall issue; they shall be reported to the next session of the General Assembly for its action."

AND WHEREAS, The General Assembly of North Carolina, at its session of 1899, did enact, chapter 21, Public Laws, section 1:

"The Treasurer of the State of North Carolina shall not pay any compensation to any person, or persons, claiming the same for services rendered concerning the Shell-Fish Industry, unless such person, or persons, are authorized to render such services under the provisions of said act, entitled, To provide for the general supervision of the Shell-Fish Industry of the State of North Carolina, and ratified March 2, 1899."

AND WHEREAS, Theophilus White brought an action of mandamus against Hal W. Ayer, Auditor, and W. H. Worth, Treasurer, to compel them to issue a warrant for his salary for services rendered concerning the Shell-Fish Industry.

AND WHEREAS, David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court, acting as Judges of the Supreme Court of North Carolina, did, on the 17th day of October, 1900, under the color of the power and authority aforesaid, in them as such Judges, cause to issue from the Supreme Court the following order:

"*Now, therefore*, You (meaning the Treasurer aforesaid) are commanded absolutely and peremptorily, without delay, to pay the warrants issued as aforesaid, by the State Auditor on you as Treasurer in favor of the plaintiff, and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not." The following copy of which writ is hereto attached.

AND WHEREAS, The said writ was an usurpation, issued in violation of the Constitution, and in defiance of the statute of this General Assembly;

AND WHEREAS, In pursuance of said writ, the said Hal W. Ayer, Auditor of the State, did, on the .... day of ....., 1900, draw his warrant upon the treasury, and the said W. H. Worth, Treasurer aforesaid, did pay the said Theophilus White the sum of $831.15, contrary to the Constitution and laws of North Carolina, as aforesaid; now, therefore, be it

Resolved by the House of Representatives of North Carolina:

1. That the action of the said W. H. Worth and Hal W. Ayer be condemned as unlawful and unconstitutional, meriting the rebuke of the people of North Carolina.

2. That the action of the said Judges of the Supreme Court is hereby declared to be in violation of the spirit and letter of the Constitution, and in defiance of the plain statutory law of this State, a usurpation of power subversive of the rights and powers of the Legislative department of the government.

3. That the said David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, be impeached of high crimes and misdemeanors in office.

4. That a committee of five be appointed to go to the Senate, and at the bar thereof acquaint the Senate that the House of Representatives will impeach David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office. That this House will, in due time, exhibit the particular articles of the impeachment against the above-named Judges of the Supreme Court, and make good the same, and that the committee do demand that the Senate make order for the appearance of the said David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, to answer the said impeachment.

"SENATORS: As directed by the order of the House of Representatives, and in the name of the whole people of North Carolina, whose Constitution has been broken, whose laws have been defied, whose future peace is threatened and imperiled, we impeach David M. Furches, late Associate Justice and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office.

"In the name of the Representatives of the people, we do demand that this Senate organize a high court of impeachment, and take order that David M. Furches and Robert M. Douglas appear at its bar, to answer the particular charges which the House of Representatives will in due time exhibit; and that the Senate do make such other and further orders in the premises as may seem to them best calculated to bring this trial to a just and speedy termination.

"In conclusion, the House of Representatives, through us, its chosen messengers, prays that the God of Eternal Truth and Justice may protect the rights of the impeached and preserve unbroken the Constitution of the fathers.

"And now, Mr. President, having discharged this momentous and melancholy duty, we await your answer, as provided by law, which answer we will make to those who sent us hither."

Mr. LONDON offers the following resolution:

"*Resolved,* That the President in behalf of the Senate announce to the gentlemen of the Committee from the House of Representatives that the Senate will receive their message, duly consider the same and take proper action thereon."

The resolution was adopted.

Thereupon Lieutenant-Governor Turner, President of the Senate, said:

"GENTLEMEN OF THE COMMITTEE:—You will bear information to the House of Representatives that the Senate has received its message and will consider the same, and will take proper action thereon, as required by law and the Constitution of the State."

The Committee from the House of Representatives then retired.

SENATE CHAMBER, February 21, 1901.

Mr. ARRINGTON offers the following resolution:

"*Resolved,* That the Committee on Rules be and is hereby directed to prepare the necessary rules to govern the Senate in the impeachment trial and to submit a printed report of the same to the Senate."

The resolution was adopted.

SENATE CHAMBER, February 23, 1901.

A message was received from the House of Representatives informing the Senate that the House had adopted specific articles of impeachment against David M. Furches, late Associate Justice, and now Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, of high crimes and misdemeanors in office; and that the House had elected the following gentlemen managers to conduct such impeachment: Messrs. Allen, of Wayne, Craig, Rountree, Graham, Hayes, Spainhour, Nicholson, Shannonhouse and Seawell, and had directed that the said managers carry to the Senate the articles agreed upon by the House to be exhibited in maintenance of the impeachment against said David M. Furches and Robert M. Douglas as aforesaid; and that the Senate is respectfully asked to name the hour when such articles of impeachment shall be presented to the Senate heretofore adopted by the House.

Mr. LONDON offered the following resolution:

"*Resolved,* That a message be sent to the House of Representatives informing that body that the Senate will receive the managers appointed by the House, and the Articles of Impeachment to-day at 2.15."

The resolution was adopted.

PRESENTATION OF ARTICLES OF IMPEACHMENT.

A committee from the House of Representatives was announced, the Managers on the part of the House, accompanied by a committee of the whole House, came forward and presented themselves at the bar of the Senate.

The Sergeant-at-Arms of the Senate made the following proclamation:

"Oh yes, oh yes, all persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of North Carolina Articles of Impeachment against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina."

Mr. ALLEN, for the committee, says:

"Mr. President and Senators:—The House of Representatives has adopted Articles of Impeachment against David M. Furches, now Chief Justice of the Supreme Court, and Robert M. Douglas, an Associate Justice of the Supreme Court. We now present to the Senate these Articles of Impeachment and ask that they be read before the Senate, and demand that the Senate take order thereon."

The Articles of Impeachment were then presented to the President of the Senate and read by the Clerk, as follows:

"Articles of Impeachment exhibited by the House of Representatives of North Carolina, in the name of themselves and all the people of North Carolina, against David M. Furches, now Chief Justice and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice of the Supreme Court of North Carolina, in maintenance and support of their impeachment against them for high crimes and misdemeanors in office.

"ARTICLE I.

"That the time hereinafter named, to-wit, on or about the 17th day of October, A. D. 1900, at and in the city of Raleigh, the said David M. Furches, now Chief Justice, who was then an Associate Justice of the Supreme Court of North Carolina, and the said Robert M. Douglas, who was then, and is now, an Associate Justice of the Supreme Court of North Carolina, and one other member of the said Supreme Court of North Carolina, now deceased, concurring therein, constituting a majority of said Supreme Court of North Carolina, unmindful of the high duties of their offices, of their oaths of office, and unmindful of the Constitution of the State of North Carolina, and specially Article I, Section 8:

"The legislative, executive and supreme judicial powers of the Government ought to be forever separate and distinct from each other;"

And also Article IV, Section 9:

"The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action;"

And also Article XIV, Section 3:

"No money shall be drawn from the Treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published."

Did under the color of their aforesaid offices, unlawfully, wilfully and in violation of the aforesaid provisions of the Constitution of the State of North Carolina, and the laws passed in pursuance thereof, in a certain controversy submitted without action, to a Superior Court Judge, under The Code of North Carolina, sections 507 and 508, entitled:

"*Theophilus White v. Hal. W. Ayer, State Auditor,* and *W. H. Worth, State Treasurer,* pending on appeal in said Supreme Court of North Carolina, and decided by the said Supreme Court on appeal at the February Term, 1900, thereof, cause to be issued by Thomas S. Kenan, Clerk of said Supreme Court, mandamus writs in words and figures following, to-wit:

(Copy for H. W. Ayer, Auditor.)

"State of North Carolina—In the Supreme Court.

"Theophilus White
"against
"H. W. Ayer, Auditor, and W. H. Worth, Treasurer.

"*The State of North Carolina to Hal W. Ayer, State Auditor*—GREETING:

This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to issue. From which judgment the defendants appealed to this Court, where the judgment of the Court below was modified in amount of the recovery, and, as modified, the judgment of the Court below was affirmed; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum, as chief inspector of the Shell-Fish Commission, five cents per mile for each mile travelled when engaged in the business of said commission, and for other extra expenses not to exceed fifty dollars per annum—whole cost of the commission not to exceed six thousand dollars per annum. And it being further declared by the Court that the defendant, Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified by the Secretary of the Board of the

Shell-Fish Commission, and countersigned by the chairman of the Shell-Fish Commission.

"Now, therefore, you are hereby, absolutely and peremptorily, without delay, to proceed to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as you shall find to be due the plaintiff thereon; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

"Witness, Thomas S. Kenan, Clerk of our said Court, at office in Raleigh, this the 7th day of October, 1900.

"THOMAS S. KENAN,
"Clerk of the Supreme Court.

"(Seal of the Supreme Court of the State of North Carolina.)

"Endorsed: Received October 17, 1900, and served same day by delivering the original to the within to Hal W. Ayer, State Auditor. R. H. BRADLEY,
"Marshal of the Supreme Court of N. C.

"Fee paid. R. H. B.

"(Copy for W. H. Worth, Treasurer.)

"State of North Carolina—In the Supreme Court.

"Theophilus White
"against
"H. W. Ayer, Auditor, and W. H. Worth, Treasurer.

"The State of North Carolina to W. H. Worth, State Treasurer—Greeting: This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment, and the writ of mandamus ordered to issue. From

which judgment the defendant appealed to this Court, where the judgment of the Court below was modified in amount of the recovery, and, as modified, the judgment of the Court below was affirmed; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum, as chief inspector of the Shell-Fish Commission, five cents per mile for each mile travelled when engaged in the business of said commission, and for other extra expenses, not to exceed fifty dollars per annum—whole cost of the commission not to exceed six thousand dollars per annum. And it being furthed declared by the Court that the defendant, Hal W. Ayer, as State Auditor, shall pass upon and audit said claims upon the same being properly certified by the secretary of the Board of the Shell-Fish Commission, and countersigned by the chairman of the Shell-Fish Commission; and it being further declared that the defendant, W. H. Worth, State Treasurer, shall pay the amount stated in the warrant drawn by the defendant, Hal W. Ayer, as Auditor aforesaid.

"Now, therefore, you are commanded, absolutely and peremptorily, without delay, to pay the warrants issued as aforesaid by the State Auditor on you as State Treasurer in favor of the plaintiff; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

"Witness: "Thomas S. Kenan, Clerk of our said Court, at office in Raleigh, this 17th day of October, 1900.

"THOMAS S. KENAN,
"*Clerk of the Supreme Court.*

"(Seal of the Supreme Court of the State of North Carolina.)"

"Fee paid.

"Endorsed: Received October 17, 1900, and served same

day by delivering the original of the within to W. H. Worth, State Treasurer. R. H. Bradley,

"*Marshal of the Supreme Court of N. C.*

"Fee paid. R. H. B..

"That, pursuant to the command contained in the aforesaid writ of mandamus issued to said Hal W. Ayer, State Auditor, the sum of eight hundred and thirty-one and 15-100 dollars was unlawfully audited and allowed by said Hal W. Ayer, State Auditor, and a warrant on the State Treasurer was issued by said Hal W. Ayer, State Auditor, in words and figures, to-wit:

"(Copy of Auditor's warrant.)

"State of North Carolina, Auditor's Department.

"Raleigh, N. C., October 20, 1900.

"The State Treasurer will pay to Theophilus White, C. I. S. F. C., or J. C. L. Harris, attorney, or order, eight hundred and thirty-one dollars and 15-100 dollars, for salary as chief inspector Shell-Fish Commissioner, compensation for extra services and mileage from March 20, 1899, to September 1, 1900.

"Charge account Shell-Fish Commission.

"Hal W. Ayer,

"R. C. Rivers, "*State Auditor.*

"*Chief Clerk.*

"Code N. C., Vol. 1, sec. ....

"Code N. C., Vol. 2, sec. ....

"Chapter 13, sec. 12, Laws 1897.

"Chapter 19, secs. 1 and 2, Laws of 1899.

"Supreme Court Decision, February Term, 1900.

"Which said warrant was subsequently, on the 22d day of October, 1900, pursuant to the command contained in the aforesaid writ of mandamus, directed to said W. H. Worth,

State Treasurer, unlawfully paid by said W. H. Worth, State Treasurer, out of the funds in his hands as State Treasurer, belonging to the State of North Carolina, without any appropriation being made by law for the payment thereof, to aforesaid Theophilus White; which aforesaid mandamus writs were unlawfully issued as aforesaid, with the intent thereby to compel, by process in the nature of execution, the payment of the aforesaid sum of eight hundred and thirty-one and 15-100 dollars out of the State Treasury, in violation of the aforesaid provisions of the Constitution, whereby the said David M. Furches, then Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, did then and there commit, and were guilty of a high crime and misdemeanor in office.

"ARTICLE II.

"That at the time hereinafter named, to-wit, on or about the 17th day of October, A. D. 1900, at and in the city of Raleigh, the said David M. Furches, now Chief Justice, and who was then an Associate Justice of the Supreme Court of North Carolina, and the said Robert M. Douglas, who was then, and is now, an Associate Justice of the Supreme Court of North Carolina, and one other member of said Supreme Court of North Carolina, now deceased, concurring therein, constituted a majority of the said Supreme Court of North Carolina, did usurp legislative authority, and did assume to themselves legislative functions, and, intending to bring the General Assembly of North Carolina into disrepute, public scandal and disgrace, unmindful of the high duties of their office as members of the said Supreme Court of North Carolina, and of their oaths of office, and in contempt, disregarded and in defiance of the provisions of chapter 21, Public Laws of North Carolina, Session of 1899, ratified the 8th day of

March, A. D. 1899, entitled: 'A supplemental act to an act, entitled, An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina, and ratified on March 2, 1899,' did, under the color of their aforesaid office, unlawfully, wilfully, and in violation of the aforesaid provisions of the Constitution of the State of North Carolina, and in disregard and contempt of the acts of the General Assembly aforesaid, in the aforesaid controversy submitted without action to a Superior Court Judge under The Code of North Carolina, secs. 567 and 568, entitled, *'Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer,'* pending on appeal in the said Supreme Court of North Carolina, and decided by the said Supreme Court at the February Term, 1900, thereof, caused to be issued by Thomas S. Kenan, Clerk of said Supreme Court, the mandamus writs aforesaid.

"And pursuant to the command contained in said writs of mandamus the claim for the sum of eight hundred and thirty-one and 15-100 dollars, was unlawful. Ayer, State Auditor, in favor of said Theophilus White, as is set forth in the aforesaid Auditor's warrant, and the aforesaid warrant on the State Treasurer was issued by said Hal W. Ayer, State Auditor, and said Auditor's warrant was unlawfully paid by said W. H. Worth, State Treasurer, out of funds in his hands belonging to the State of North Carolina in the treasury thereof, contrary to the provisions of the aforesaid supplemental act of the said General Assembly, ratified as aforesaid on the 8th day of March, A. D. 1899, which aforesaid mandamus writs were unlawful and contrary to the aforesaid provisions of the Constitution of the State of North Carolina, and the acts of the General Assembly of North Carolina, and in disregard and contempt thereof, and were issued as aforesaid with the intent thereby to compel, by process in the nature of an execution, the payment of the said sum of eight hundred and thirty-one and 15-100 dollars out of the State

Treasury, in violation of the aforesaid provisions of the Constitution and the Public Laws of the State of North Carolina:

"Whereby the said David M. Furches, Associate Justice (now Chief Justice), and the said R. M. Douglas, Associate Justice of the Supreme Court of North Carolina, did then and there commit, and were guilty of a high crime and misdemeanor in office.

"ARTICLE III.

"That the aforesaid controversy without action, entitled as aforesaid, *'Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer,* was decided by the said Supreme Court of North Carolina, on or about May 22, 1890, at the February Term of the said Court, and prior to the 14th day of June, 1890, said Supreme Court had adjourned for the term without directing any mandamus writs to issue in said cause; and that on the 14th day of June, 1900, the General Assembly being in adjourned session, passed the following resolution, to-wit:

"*'Resolved by the House of Representatives, the Senate concurring,* That a committee of two members of this House be appointed by the Speaker, who shall wait upon the State Treasurer and ascertain from him if he has paid out any money to Theophilus White, and, if so, by what authority he made such payment.'

"That, pursuant to the aforesaid resolution a committee was appointed who visited the office of the said State Treasurer and ascertained from him, and reported to the General Assembly that no money had been paid to said Theophilus White as Chief Inspector Shell-Fish Commission, since the passage of the act entitled, 'An act to provide for the general

supervision of the Shell-Fish Industry in the State of North Carolina,' ratified the 2d day of March, 1899, and the supplemental act, ratified March 8, 1899, entitled, 'A supplemental act to an act entitled An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina,' ratified March 2, 1899.

"But subsequently, to-wit, on or about the 17th day of October, 1900, notwithstanding the passage of the aforesaid resolution of inquiry, and notwithstanding that it was well known to said Supreme Court that the General Assembly had asserted its right, as guaranteed by the Constitution of North Carolina, to control the disbursement of the money in the State Treasury, and to forbid the payment of money out of said treasury to said Theophilus White, under the decision aforesaid, a majority of the members of the Supreme Court, including said David M. Furches, Associate Justice (now Chief Justice), and said Robert M. Douglas, Associate Justice, did, thereafter, to-wit, on or about the 17th day of October, 1900, at and in the city of Raleigh, in contempt and defiance of said General Assembly and the acts thereof, and in violation of the aforesaid provisions of the Constitution in that behalf, knowingly, wilfully and wrongfully direct and cause the aforesaid writs of mandamus to be issued, whereby said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, then and there did commit and were guilty of a high crime and misdemeanor in office.

"ARTICLE IV.

"That on or about the 17th day of October, 1900, at and in the city of Raleigh, the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, and one other member, now deceased, of the said Supreme Court of North Carolina, constituting a

majority of the said Supreme Court, directed the aforesaid peremptory writs of mandamus to be issued, and they were issued by said Thomas S. Kenan, Clerk of said Supreme Court. That said writs of mandamus were not issued in conformity to law, nor according to the orderly course and practice of the courts, in this, that—

"Specification 1. That Article IV, section 9, of the Constitution of North Carolina, confers upon the Supreme Court 'original jurisdiction to hear claims against the State,' and no statutory enactment has ever been provided to the contrary since the adoption of the aforesaid constitutional provision; that the aforesaid controversy, submitted without action, to-wit, the controversy submitted without action of *Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer*, hereinbefore referred to, as the record thereof fully shows, involved a claim of the said Theophilus White against the State of North Carolina, and the mode or manner by which payment thereof might be enforced, and it is nowhere provided, either in the Constitution or statutory laws of North Carolina, that such a controversy without action can be submitted to the adjudication of a Supreme Court Judge, and especially to a Superior Court Judge holding court in a county other than the county of Wake.

"That the said Hal W. Ayer, State Auditor, and the said W. H. Worth, State Treasurer, could not lawfully have been sued in the county of Perquimans on account of the matters set forth in said controversy, submitted without action, as was done in the aforesaid controversy submitted without action in the Superior Court of Perquimans County, nor is it provided either in the Constitution or statutory laws of North Carolina that the aforesaid Supreme Court of North Carolina should have appellate jurisdiction therein.

"Specification 2. That the aforesaid mandamus writs were directed to be issued, as aforesaid, in wilful disregard of the statutory provisions relating to the application for writs of mandamus.

"Specification 3. That the aforesaid mandamus writs were directed to be issued and were issued, as aforesaid, contrary to the course, practice and procedure of the said Supreme Court of North Carolina.

"Specification 4. That the aforesaid mandamus writs were directed to be issued and were issued, as aforesaid, in disregard of the provisions of chapter 19 of the Public Laws of 1899, entitled, 'An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina,' ratified the 2d day of March, A. D. 1899, and in a manner designated by the Supreme Court without any legislative authority whatever; and also in disregard and defiance of chapter 21 of the Public Laws of 1899.

"Specification 5. That, well knowing that two of the Associate Justices of the Supreme Court of North Carolina did not concur with the aforesaid majority of the Court in directing the aforesaid mandamus to be issued, one of the dissenting Associate Justices, claiming the right to do so, was refused and prevented by the aforesaid majority of the said Supreme Court, including the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, from entering his protest against the issuing of said mandamus writs upon the minutes of the said Supreme Court, and was also denied the right to file his opinion, giving his reasons and grounds for dissenting from the action of the said Supreme Court in directing the aforesaid mandamus writs to be issued.

"Whereby the aforesaid David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, did then and there commit and were guilty of a high crime and misdemeanor in office.

"ARTICLE V.

"That the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate

Justice of the Supreme Court of North Carolina, with their concurring Associate, constituting a majority of said Court, unmindful of the high duties of their offices, of their oaths of office, and in violation of the Constitution of North Carolina, at various times and in numerous decisions of said Court, commonly known as the 'office-holding cases,' and so designated by Robert M. Douglas, Associate Justice, in his concurring opinion in the aforesaid case of *Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer,* persistently, wilfully and unlawfully, and intending to bring contempt, disrepute and public scandal on the General Assembly of North Carolina, and to nullify and render of no effect the acts thereof, did, by a specious course of reasoning, wherein they declare the said acts unconstitutional, in whole or in part, as suited their said purpose, or disregarded the true meaning and intent thereof, nullify, destroy and in effect repeal said acts of the General Assembly, and contemptuously thereby did annul and defeat the legislative will expressed within the scope of its constitutional authority, in derogation of the Constitution and laws of North Carolina, and that, in culmination and consummation of said persistent, wilful and unlawful intent to discredit and bring into public contempt the said General Assembly of North Carolina, and the laws passed by the said General Assembly, and to impair and destroy its power and to nullify and abrogate the laws thereof, the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina,) with their concurring Associate, constituting a majority of said Court, in disregard of their oaths of office, and in violation of the Constitution of North Carolina, did, in the aforesaid controversy, without action, cause to be issued from said Court the aforesaid peremptory mandamus writs, and under color of their offices as Associate Justices of the Supreme Court, and in derogation

of the Constitution and laws, did cause to be unlawfully drawn from the State Treasury of North Carolina the said sum of eight hundred and thirty-one and 15-100 dollars ($831.15), and by said wilful, unlawful and wrongful acts and misconduct in office the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, did then and there commit and were guilty of a high crime and misdemeanor in office.

"And the House of Representatives in protestation, reserving to themselves the liberty of exhibiting at any time hereafter any further articles or other accusations of impeachment, against the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, and also of replying to their answers which they shall make under the articles herein preferred against them, and of offering proof to the same, and every part thereof, and to all and every other article, accusation or impeachment which shall be exhibited by them as the case shall require, do demand that the said David M. Furches, Chief Justice (formerly Associate Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, may be put to answer the high crimes and misdemeanors in office herein charged against them, and that such proceedings, examinations, trials and judgments may be thereupon had and given as may be agreeable to law and justice.

"W. R. Allen,
"Locke Craig,
"Geo. Rountree,
"A. W. Graham,
"R. H. Hayes,
"Blake Baker Nicholson,
"F. M. Shannonhouse,
"A. A. F. Seawell,
"J. F. Spainhour."

The President of the Senate said:

"*Mr. Speaker, Gentlemen of the Board of Managers, and Gentlemen of the House of Representatives:*

"The Senate will take proper order on the articles of impeachment against David M. Furches, late Associate Justice (now Chief Justice), and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, as required by law, of which due notice will be given to the House of Representatives."

Mr. ALLEN, speaking for the committee, said, in reply:

"MR. PRESIDENT:—The managers upon the part of the House of Representatives will now retire and await the further order of the Senate."

Thereupon the managers and members of the House of Representatives withdrew from the Senate Chamber.

Mr. LONDON offered the following resolution:

"*Resolved,* That the Senate will organize as a Court of Impeachment at 12:30 o'clock, on Monday, the 25th day of this month."

The resolution was adopted.

Mr. ARRINGTON, for the Committee on Rules, reported the following rules for the government of the impeachment trials:

"RULES FOR THE GOVERNMENT OF THE IMPEACHMENT TRIAL.

"RULE I. Before proceeding to the consideration of the articles of impeachment, the presiding officer shall administer to the members of the Senate then present, and to other members as they shall appear, the following oath: 'I, ...

....., swear truly and impartially to try and determine the charges in the articles of impeachment exhibited against David M. Furches, Chief Justice of the Supreme Court of North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, under the Constitution and laws thereof, according to the evidence: So help me God.'

"RULE II. The Principal Clerk of the Senate shall act as Clerk of the Court of Impeachment, and shall report the proceedings of the Court in the same manner as the legislative proceedings of the Senate.

"RULE III. The Door-keeper of the Senate shall execute all orders of the presiding officer of the Senate, and he may employ such assistants as may be necessary for that purpose.

"RULE IV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

"RULE V. Before proceeding to the trial on each day the following proclamation shall be made by the Door-keeper of the Senate: 'O, yes! O, yes! O, yes! all persons are commanded to keep silence, on pain of imprisonment, while the Senate of North Carolina is sitting for the trial of articles of impeachment against David M. Furches, Chief Justice of North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina.

"RULE VI. That the following form of summons be adopted, to-wit:

"THE STATE OF NORTH CAROLINA.

"The Senate of North Carolina, to David M. Furches and Robert M. Douglas—Greeting:

"WHEREAS, The House of Representatives of the State of North Carolina, did, on the ..... day of February, 1901, exhibit to the Senate articles of impeachment against you, the said David M. Furches and Robert M. Douglas, which

said articles, appended to this summons, demand that you, the said David M. Furches and Robert M. Douglas, and each of you, should be put to answer the accusations as set forth in said articles. And that such proceedings, examinations, trials and judgments might be thereupon had as are agreeable to law and justice, you, the said David M. Furches and Robert M. Douglas, and each of you, are therefore hereby summoned to appear forthwith before the Senate of North Carolina, at their chamber, in the city of Raleigh, then and there to answer to the said articles of impeachment, and then to abide by, obey, and perform such orders, directions and judgments as the Senate of North Carolina shall make in the premises according to the laws and Constitution of North Carolina. Hereof you are not to fail. Witness, W. D. Turner, Lieutenant-Governor, and President of the Senate, at the city of Raleigh, this ..... day of February, 1901.

"RULE VII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be from 10 o'clock a. m. to 1 o'clock p. m., when an adjournment shall be taken till 3 o'clock p. m., when the Court shall convene and sit till 6 o'clock p. m. The President shall cause proclamation to be made each time the Court convenes and adjourns. Upon a motion seconded by one-fifth of the members present the Court may determine to adjourn earlier or sit longer. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate.

"RULE VIII. All motions made by the parties or their counsel shall be addressed to the presiding officer, and if he or any Senator shall require it, they shall be committed to writing and read at the Clerk's desk.

"RULE IX. The Reading Clerk of the Senate shall read all papers which may be sent to the Clerk's desk, and act as the deputy to the Principal Clerk, and assist in the performance of the duties presented for that officer.

"RULE X. Each witness shall be examined by one person

on behalf of the party introducing him, and then cross-examined by one person on the other side.

"Rule XI. If a Senator is called as a witness he shall be sworn, and give his testimony standing in his place.

"Rule XII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the presiding officer.

"Rule XIII. All preliminary or interloctuory questions and all motions shall be argued for not exceeding one-half hour on each side, unless the Senate shall, by order, extend the time.

"Rule XIV. The case on each side shall be opened by one person. As many of the Managers and counsel as desire to do so shall be permitted to file arguments or address the Senate orally. The opening and conclusion shall be on the part of the House of Representatives, unless the defendants offer no testimony, in which event the defendants shall have the opening and conclusion.

"Rule XV. If the Senate shall at any time fail to sit for the consideration of the articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

"Rule XVI. Witnesses shall be sworn in the following form: 'You solemnly swear that the evidence you shall give in the case now pending between the State of North Carolina and David M. Furches and Robert M. Douglas, shall be the truth, the whole truth, and nothing but the truth: So help you God.' Which oath shall be administered by the Clerk of the Senate or other authorized person.

"Rule XVII. The following shall be the form of subpœna, which shall be issued upon the application of either of the parties or their counsel:

"'*The Senate of North Carolina,*

To James B. Smith—Greeting:

"'You are hereby commanded to summon ..... to appear before the Senate of North Carolina, on the ..... day of ....., 1901, at the Senate Chamber, in the city of Raleigh, then and there to testify his knowledge in the cause which is before the Senate, and in which the House of Representatives have impeached David M. Furches and Robert M. Douglas. Fail not, and make due return of the service of this subpœna.

"'Witness, A. J. Maxwell, Clerk of the Senate, at Raleigh, this ..... day of ....., 1901.

"'.....,

"'*Clerk of the Senate.*'

"RULE XVIII. All the orders and decisions shall be made and had by yeas and nays upon the demand of one-fifth of the members present and without debate, except upon a vote of a majority of the members present, allowing discussion, and in that case no member shall speak more than once on one question, and not more than five minutes upon an interlocutory question, and not more than ten minutes on the final question, unless by consent of the Senate, to be had without debate; but each Senator shall be permitted to file, within five days after the vote shall have been taken upon the articles of impeachment, his written opinion, to be printed with the proceedings.

"RULE XIX. In taking the votes of the Senate upon the articles of impeachment, the Clerk will read the several articles successively, and after the reading of each article the Clerk will call the name of each Senator, who shall rise in his place, and thereupon the presiding officer put the following question: 'Mr. ....., how say you? Are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in .... article of impeach-

ment?' Whereupon each Senator shall answer 'guilty' or 'not guilty.'

"RULE XX. If the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the persons accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thrids of the members present, the Senate shall proceed to announce judgment, and a certified copy of such judgment shall be deposited in the office of Secretary of State."

The report was adopted.

IMPEACHMENT TRIAL

OF

David M. Furches, Chief Justice of the Supreme Court of North Carolina,

AND

Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina.

FIRST DAY.

THE SENATE CHAMBER,
RALEIGH, N. C., Monday, February 25, 1901.

The hour of 12.30 having arrived, the Senate, in accordance with resolution adopted on Saturday, proceeds to organization as a Court of Impeachment, being called to order by the President of the Senate, Lieutenant-Governor W. D. Turner.

The roll of Senators is called, and Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Calvert, Candler, Burroughs, Buchanan, Crisp, Currie, Dula, Foy, Foushee, Glenn, Gudger, Henderson, James, Justice, Lindsey, London, Long, Marshall, McAlister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Roberson, Scott, Smith, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Wood and Woodard, appear at the bar of the Senate and repeat and take the following oath of office, administered by the President of the Senate:

"I swear truly and impartially to try and determine the charges and the Articles of Impeachment exhibited against

David M. Furches, Chief Justice of the Supreme Court of North Carolina, and Robert M. Douglas, Associate Justice, of the Supreme Court of North Carolina, under the Constitution and laws thereof, and in accordance with the evidence. So help me God."

A. J. Maxwell is sworn as Principal Clerk of the Court of Impeachment, and J. B. Smith as Sergeant-at-Arms of the Court of Impeachment, and W. L. Cahoon as Reading Clerk of the Court of Impeachment; and W. T. Smith as Special Stenographer of the Court of Impeachment; each to perform the duties of their several offices to the best of their skill and ability and according to law, the oath being administered by the President of the Senate.

The Court being thus organized, Senator London offers the following resolution:

"*Resolved,* That the rules adopted by the Senate for the government of the Impeachment Trial be retained for use in this Court until further ordered."

The resolution is adopted.

Senator LONDON: "I desire to offer this resolution."

"*Resolved,* That a message be sent to the House of Representatives informing that honorable body that the Senate is organized for the trial of Impeachment of David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice, of the Supreme Court of North Carolina, and that it is ready to receive the Managers of Impeachment at its bar."

The resolution is adopted, and the message is accordingly sent.

The arrival of the Board of Managers is announced by the Sergeant-at-Arms, and the Managers are invited to seats.

Mr. Manager ROUNTREE, speaking for the Committee of Managers, says:

"I am instructed by the Board of Managers on behalf of the House of Representatives to pray that process issue from the Senate against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice, to answer the Articles of Impeachment heretofore delivered at the bar of the Senate by the House of Representatives through its Managers.

Senator LONDON: "I offer the following resolution:"

"*Resolved,* That a summons be issued to David M. Furches, Chief Justice, and to Robert M. Douglas, Associate Justice, to appear and answer the Articles of Impeachment heretofore exhibited against them, and that said summons be made returnable to-day at 1.15 p. m."

The resolution is adopted.

The summons and the Articles of Impeachment are thereupon delivered to the Sergeant-at-Arms with instructions to serve the same at once.

Mr. Manager ROUNTREE: "I suppose the Managers can now retire."

The PRESIDENT: "Yes, sir."

On motion of Senator Brown, the Court thereupon takes a recess for fifteen minutes.

The Court reconvenes.

The Managers on the part of the House arrive and take their seats.

The PRESIDENT: "The Clerk has ready the returns of the Sergeant-at-Arms."

The returns are read by the Clerk, as follows:

"Received February 25th, A. D. 1901; executed by delivering a copy of the Articles of Impeachment to David M. Furches, and by reading the within summons to him.

This 25th day of February, 1901.

J. B. SMITH,
Sergeant-at-Arms of the Senate."

"Received February 25th, A. D. 1901; executed by delivering a copy of the Articles of Impeachment to Robert M. Douglas and by reading the within summons to him.

This 25th day of February, 1901.

J. B. SMITH,
Sergeant-at-Arms of the Senate."

The Sergeant-at-Arms announces the arrival of the counsel for the defendants.

The PRESIDENT: "The counsel will come forward. They are invited to take seats on the right."

Mr. Manager ROUNTREE: "I desire to announce that Mr. Charles M. Busbee and Mr. James H. Pou, whom I am expecting in a moment or two, are associated with us as the counsel for the Managers."

The PRESIDENT: "The Sergeant-at-Arms will provide seats for them."

Mr. JARVIS: "I present a communication from the Judges which I ask you to order to be read."

The Clerk thereupon reads the following communication:

STATE OF NORTH CAROLINA,
CITY OF RALEIGH,
February 25, 1901.

Hon. W. D. TURNER, *Lieutenant-Governor and President of the Senate.*

Each of us having been served with a summons to appear before the Senate of North Carolina at their chamber in the city of Raleigh forthwith, then and there to answer certain Articles of Impeachment preferred against us by the House of Representatives, do hereby enter our appearance by our counsel, Frank I. Osborne, F. H. Busbee, Thomas J. Jarvis,

Charles M. Cooke, William P. Bynum, Jr., B. F. Long and J. Lindsey Patterson, who have our warrant and authority therefor.

"It is neither our purpose nor desire to delay this trial beyond the necessary limit, but it is a matter of vast importance to us, as well as to the public, and we respectfully request that we be given a reasonable time to prepare our answer and defence to these charges.

DAVID M. FURCHES, and
RO. M. DOUGLAS."

The PRESIDENT: "The communication will be entered of record."

Mr. Manager ROUNTREE: "I am instructed by the Managers to say that we now have no objection to fixing a time within which the respondents should answer. We are ourselves at present, or soon will be, prepared to proceed with the trial. Of course, as to what time you will give them is a matter which rests entirely in the breast of the Court. We are content with your decision."

Senator HENDERSON: "I think the Court would like to hear from the counsel for the Judges, to know what time they would like to have."

Mr. JARVIS: "Mr. President—Ordinarily, I would say that thirty days would only be a reasonable time in which for the Judges to file their answers and make preparation for trial, but we are cognizant of the conditions which surround the Senate, and it is the purpose of the counsel, as well as the desire of the accused, to cooperate with the Senate in bringing this case to as speedy a trial as possible, consistent with a proper defence of the Judges. If we knew the purpose of the Senate, or rather the wishes of the Senate, as to their legislative work, as to whether they propose to take up the case and try it while the legislative work is proceeding, or

whether they propose to continue the work continuously until it ends and then take up the impeachment trial, we probably might be able to co-operate with the wishes of the Senate more definitely. In the absence of that knowledge, however, assuming that it is the preference of the Senate to proceed with its legislative work continuously to its termination, I will say, if this is the purpose of the Senate, while we think it is not sufficient time, yet we will try to accommodate ourselves to the conditions, and will ask you to give us, I say, until the 6th day of March within which to file our answers; then, I think, the Managers will want some time to file replications, if advised that they are needed, and that the trial will begin on the 11th day of March. We will try to conform to that arrangement, if it shall suit the pleasure of the Senate to make it."

Mr. Manager ROUNTREE: "After conference, I am instructed to say that we have no desire to unduly hasten the other side in the preparation of the answers, but we would suggest that they be given until next Monday, to-day week, in order to file their answers, and that we be given in behalf of the House one day to file replications, if we shall see fit, and that the trial began on Wednesday, the 6th. Of course you will understand that we are entirely in the hands of the Senate, and that any order it makes will be satisfactory to us."

Senator MORRISON: "I move that the defendants be allowed until the sixth day of March to file answers, with the understanding that at that time we consider the question as to the time to be allowed to file replications."

Mr. JARVIS: "In shortening our time, as to the time within which answers can be filed, I was taking into consideration the other proposition that the trial would not be begun until the 11th day of March."

Senator MORRISON: "I will put that in my motion.

I think the request of the defendants entirely reasonable and I am willing to accede to it in all respects."

Mr. JARVIS: "It was the preparation of the case as well as the mere act of filing answers. It is the preparation of the case for trial, so that when we begin the trial we may be able to go ahead rapidly, as all preparation would have been made; and there is not a lawyer in the Senate but knows we can try a case more expeditiously under such circumstances than when he is obliged to make preparation as he goes along with the trial. It was in this view I made the request."

The PRESIDENT: "Mr. Morrison, will you please send forward your resolution."

Senator MORRISON: "I have not quite finished writing it—one moment. I now send it forward."

The Clerk reads: "Resolved that the respondents file their answers to the Articles of Impeachment at or before 12 m., on March 6th, and that the Representatives of the House have three days to file replications, and that the trial shall begin on the 11th day of March."

The resolution is adopted and it is so ordered.

Mr. JARVIS: "Capt. Cooke, one of the counsel named in the communication of the Judges, desired to be present here this morning, but was called home by a telegram announcing the death of one of the citizens."

Mr. Manager ROUNTREE: "Mr. Davidson has not yet arrived. I desire to make this statement for the Board of Managers, in order to make it clear that there will be additional counsel associated with us whose names will be given at the proper time, and who will appear with us; and, Mr. President, I desire to ask in behalf of Mr. Spainhour, that he be allowed to sign the Articles of Impeachment which he, being absent, was unable to sign."

Senator MORRISON: "I move that Mr. Spainhour be

allowed to sign the Articles of Impeachment, as requested by the Managers of the House."

The motion is carried, and it is so ordered.

Senator ARRINGTON: "I move that the Court now adjourn until the 6th day of March, 1901, at 12 o'clock."

The motion is carried, and it is so ordered.

SECOND DAY.

THE SENATE CHAMBER,
Wednesday, March 6, 1901.

The Court of Impeachment was called to order at 12 m., March 6, 1901, by the President of the Senate, and proclamation thereof was duly made by the Sergeant-at-Arms.

The Managers and their counsel appear before the Bar of the Senate.

Senator LONDON: "I move that the door-keeper notify the counsel for the respondents that the Court is ready to proceed with the trial."

The motion is carried, and it is so ordered.

The respondents and their counsel enter and are given seats.

Senator LONDON: "I move that Senators Leak, Speight and Webb be sworn as members of the Court."

The motion is adopted, and the Senators come forward and are sworn by the President of the Senate as members of the Court of Impeachment, in same manner and form as other members of the Court, on February 25, 1901.

Mr. Manager ALLEN: "I wish to announce that the Managers on the part of the House have associated with them Messrs. C. B. Watson, Theo. F. Davidson, W. A. Guthrie, James H. Pou and C. M. Busbee, as counsel."

Mr. JARVIS: "The respondents are present, attended by their counsel, and are ready to file their answer to the several Articles of Impeachment, if it is now the pleasure of the Senate to receive it."

Senator ARRINGTON: "I move that the answer be received."

This motion is carried.

The PRESIDENT: "The Clerk will read the answer of the respondents to the Articles of Impeachment."

The Clerk reads the answer of the respondents to the Articles of Impeachment, as follows:

ANSWER OF RESPONDENTS IN IMPEACHMENT PROCEEDINGS.

IN THE SENATE OF NORTH CAROLINA SITTING AS A COURT OF IMPEACHMENT.

THE STATE OF NORTH CAROLINA *vs.* DAVID M. FURCHES, Chief Justice, and ROBT. M. DOUGLAS, Associate Justice of the Supreme Court.	**Upon Articles of Impeachment Exhibited Against Them by the House of Representatives of North Carolina.**

THE ANSWER OF DAVID M. FURCHES, NOW CHIEF JUSTICE, AND LATE ASSOCIATE JUSTICE OF THE SUPREME COURT OF NORTH CAROLINA, AND ROBERT M. DOUGLAS, ASSOCIATE JUSTICE, TO THE ARTICLES OF IMPEACHMENT EXHIBITED AGAINST THEM BY THE HOUSE OF REPRESENTATIVES OF THE STATE OF NORTH CAROLINA.

These respondents, saving to themselves all exceptions whatsoever to the said articles, or any of them, and the charges therein contained, answer and say:

ANSWER TO ARTICLE I.

That these respondents admit that on the 17th of October, 1900, they were Associate Justices of the Supreme Court of North Carolina, and that William T. Faircloth, the other member of said Supreme Court of North Carolina, referred to in said article as now deceased, and as then concurring in the wrongful acts charged in said article, was Chief Justice of said Court; the respondents further admit that the writs of mandamus set out in said article were issued by the Clerk and served by the Marshal of the said Court at the time alleged in said article, under the circumstances hereinafter set forth; the respondents have no personal knowledge of the issuance of the warrant by the Auditor and of the payment thereof by the Treasurer, but have been informed and believe that such warrant was issued and paid, but when and under what circumstances the respondents have no definite knowledge; that the writs of mandamus set out in said article were issued by the Clerk of the Supreme Court in accordance with the judgment, entered in accordance with the opinion of the said Court, filed May 22, 1900, in the case of Theophilus White against H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer; and respondents at the time the writs were issued by the Clerk believed, and still believe, that it was the duty of the Clerk to issue the same in accordance with the judgment and opinion of the Court, which had been theretofore filed.

In order to show more fully to this honorable Court the reasons which moved these respondents and the majority of the Supreme Court of North Carolina to authorize and direct the issuance of the said writs, these respondents respectfully refer to the opinion of the Court, written by the respondent Furches in the said case of Theophilus White against H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer, to

the concurring opinion of the respondent Douglas, and to the facts agreed and the judgment therein, and pray that the same, or so much thereaf as relates to this cause, be taken as a part of this answer; the said opinions, facts agreed and judgment being as follows:

THEOPHILUS WHITE v. H. W. AYER, STATE AUDITOR, AND W. H. WORTH, STATE TREASURER.

(Decided May 22, 1900.)

CONTROVERSY SUBMITTED WITHOUT ACTION, under The Code, secs. 567 and 568, to *Starbuck,* J., holding the Superior Court of Perquimans County, and determined December 4, 1899.

Upon the facts agreed, which are copied into the opinion, his Honor rendered the following judgment:

This cause coming on to be heard before STARBUCK, J., upon the facts agreed, it appears that the Supreme Court, in the cause entitled, *"State ex rel. Theophilus White v. George H. Hill, et al.,"* has held that chap. 19, Public Laws of 1899, is void in so far as it undertakes to appoint the persons therein named to the offices of Shell-fish Commissioners therein undertaken to be established, and that chap. 18, Public Laws of 1899, is void in so far as it undertakes to repeal that part of chap. 13, Public Laws of 1897, which created the office of Chief Inspector of Shell-fish, to which office plaintiff was duly appointed.

The Court is of opinion that the plaintiff is entitled to receive salary and expenses as provided under chap. 13, Laws of 1897, unless payment of the same has been prohibited by chap. 21, Public Laws 1899, which directs that the State Treasurer shall not pay any compensation for services rendered concerning the shell-fish industry, unless such persons are authorized to render such services under the provisions of chap. 19, Laws 1899.

It is manifest that the General Assembly, by enacting said chap. 21, did not intend that the Chief Inspector should perform the duties of his office without compensation therefor.

It is equally manifest that said chapter was enacted upon and would not have been enacted upon but for the assumption that by chap. 18 the office of Chief Inspector had been abolished, and that by chap. 19 the persons named therein had been appointed to the offices of Shell-fish Commissioners.

The Court is therefore of opinion that said chap. 21 is dependent upon and falls with those parts of chaps. 18 and 19, which have been held to be void.

It further appears that said chap. 19, Laws of 1899, which provided for the appointment of seven persons as Shell-fish Commissioners, further provides that "each of the said Commissioners shall receive as compensation the sum of $400 per annum."

It is manifest that by said provision the General Assembly did not intend to increase the salary of the Chief Inspector to $2,800, or to diminish it to $400, but to provide compensation for the seven Commissioners undertaken to be appointed.

The Court is of opinion that said provision as to compensation can not be construed as amendatory to chap. 13, Laws of 1897, but is dependent upon and falls with the void provision as to the appointment of Shell-fish Commissioners.

It is hereupon adjudged that plaintiff is entitled to receive a salary of $75 per month and actual travelling expenses, as provided under chap. 13, Public Laws of 1897, from March 15, 1899, up to the present time; and it is further ordered and adjudged that a mandamus issue directed to H. W. Ayer, the State Auditor, commanding him to issue a warrant for the amount due the plaintiff under chap. 13, Public Laws of 1897, and that a mandamus

issue directed to W. H. Worth, State Treasurer, commanding him to pay to plaintiff said amount.

H. R. STARBUCK,
Judge Presiding First Judicial District.

To the foregoing judgment the defendants excepted. Exception overruled. Appeal prayed by defendants. Notice waived. Appeal bond adjudged unnecessary. The controversy without action and the judgment to constitute the case on appeal.

J. C. L. Harris, attorney for plaintiff.
F. H. Busbee, attorney for defendants.

December 4, 1899.

Messrs. F. H. Busbee, and *Cook & Green,* for appellants.
Mr. J. C. L. Harris, for appellee.

FURCHES, J. This is a controversy without action under secs. 567 and 568 of The Code. The facts agreed, upon which the judgment of the Court is asked, are as follows:

The General Assembly of North Carolina, in 1897, passed an act to provide for and promote the oyster industry of North Carolina, ratified February 23, 1897, being chap. 13 of the Laws of 1897. This act is made a part of the case.

That on the 23d day of February, 1897, the plaintiff was duly appointed by the Governor of North Carolina, under the provisions of said act, Chief Inspector for the constitutional term of four years, and was duly commissioned as such, and was inducted into said office and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in sec. 13 of the act.

The General Assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shell-fish industry of the State, ratified March 2, 1899, being chap. 19

of the Laws of 1899. Under this act, the persons named in sec. two (2), namely: George H. Hill, of Washington, Beaufort County; B. D. Scarboro, of Avon, Dare County; Daniel L. Roberts, of New Bern, Craven County; Robert W. Wallace, of Beaufort, Carteret County; C. C. Allen, of Elizabeth City, Pasquotank County; J. M. Clayton, of Englehard, Hyde County, and Daniel B. Hooker, of Bayboro, Pamlico County, undertook to discharge the duties of Shell-fish Commissioners, under the claim that the Act of 1897 was repealed by the Act of 1899.

That the persons named in the preceding paragraph, having undertaken, under the title of Shell-fish Commissioners, to discharge the duties devolving upon the plaintiff as Chief Inspector, and having taken possession of the Steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the Supreme Court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case.

That since the 15th day of March, 1899, up to November 20, 1899, the defendant H. W. Ayer, Auditor of the State, has refused to issue to the plaintiff a warrant for the sum of $75 per month and his actual travelling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the Act of 1897; and the defendant W. H. Worth, State Treasurer, for the same period of time, has refused to pay the salary and travelling expenses of the plaintiff as Chief Inspector, and also the $50 per month claimed by the deputy inspectors.

That since the opinion of the Supreme Court has been filed the plaintiff has again demanded of the Auditor the issuance of a warrant in his favor for the amount of his salary and expenses, and the same has been refused by the defendants. The defendants base their refusal upon the

Acts of 1899, chap 21, which is made a part of this controversy.

The plaintiff insists that by the decision of the Supreme Court, hereinbefore mentioned in the facts agreed, he is entitled to a salary of $75 a month and actual travelling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chap. 21, Acts of 1899, above mentioned.

He asks that a mandamus issue to the defendant, the State Auditor, requiring him to issue a warrant for the amount due him under the law, and also that a mandamus issue, directed to the State Treasurer, requiring and compelling him to pay the same, and for all further relief which, under the facts above mentioned and the law of North Carolina, he is entitled to.

It is further agreed that no part of the compensation as provided in chap. 19, Public Laws 1899, has been paid to the persons therein named as Shell-fish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chap. 13, Laws of 1897, and chap. 19, Laws of 1899, an amount sufficient and available for the payment of such salary and travelling expenses as the plaintiff may be entitled to.

Upon these facts the plaintiff contends that he is entitled to a writ of mandamus against the defendants. This contention is disputed by the defendants, and the plaintiff's right to a mandamus is denied.

It has been decided by this Court that the plaintiff is entitled to hold his office of Chief Inspector, to which he was appointed in 1897, for the remainder of his term of four years. *White v. Hill,* 125 N. C., 194. This is settled, and the question is now presented as to whether or not he shall have pay for his services.

The plaintiff was duly appointed and inducted into his said office in March, 1897, for a term of four years, under

an Act of the Legislature ratified on the 23d day of February, 1897, being chap. 13 of the Public Laws of that year. Under this act he was entitled to a salary of $75 per month, or $900 per annum, payable monthly. This is not denied by the defendants, but they say that chaps. 18, 19 and 21, of the Public Laws of 1899, had the effect to destroy the plaintiff's right to pay. They say that chap. 18 repeals sec. 13 of the Act of 1897, and this is true; and they say that chap. 21 prohibits them from paying a salary to anyone not acting under chap. 19, of said act; and it is true that this act so provides.

And the defendants say that the plaintiff is not acting under the act, chap. 19, and is not entitled to any pay for his services. But, as it is seen that the plaintiff's office to which he was appointed in 1897 still exists, and that he is entitled to hold the same and perform its duties, it would seem that he is entitled to receive the salary attached thereto. *Dalby v. Hancock,* 125 N. C., 325; *Gattis v. Griffin, Ib.,* 332.

The Legislature may abolish a legislative office, and this is the end of it. *White v. Hill, supra; Hoke v. Henderson,* 15 N. C., 1. When the office is abolished, this ends the term of the officer holding it, as there can be no officer without an office, and of course no salary without an officer.

The Legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent and to starve him out. But if it clearly appears that it was done for that purpose, it would be void. *Bunting v. Gales,* 77 N. C., 283; *Hoke v. Henderson, supra.* In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. *Hoke v. Henderson, supra.*

But if the Legislature should undertake to deprive the officer of the whole of his salary, while his office still con-

tinued, the intent would so plainly appear that the act would be declared void. *Hoke v. Henderson, supra; Cotten v. Ellis,* 52 N. C., 545.

The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may be passed, and in force, during his term of office.

The Legislature on the 28th day of February, 1899, passed an act expressly amendatory of chap. 13, Laws 1897, this being the act under which the plaintiff was appointed. And on the 2d day of March, two days thereafter, it passed another act upon the subject of oysters and shell-fish. This act does not state that it is an amendment of the former acts, nor does it purport to repeal the previous legislation on the subject of oysters and shell-fish, except so far as they are in conflict with the act of the 2d of March, 1899. And on the 8th of March, 1899, it passed chap. 21, which is stated to be "supplemental to chap. 19, passed on the 2d of March." This last act prohibits the Treasurer from paying any compensation claimed for services unless the person so claiming them shall be authorized to render such services under chap. 19, of which this act is a supplement. The Legislature having general powers of legislation, all these acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff. (We say the constitutional rights of the plaintiff, for the reason that his rights alone are before us for our consideration.)

It is then the duty of the plaintiff to administer his office under the law as it now exists; that is, under the Act of 1897, as modified and changed by the Legislature of 1899, chap. 18 and chap. 19 of the Public Laws of 1899.

For the purposes of this action it is not necessary for us to decide whether chaps. 18 and 19, Laws of 1899, were intended as amendments of the Act of 1897 or not. They are both a part of the Public Laws of the State, and must be

observed when not in conflict with the plaintiff's vested rights. Chap. 18 is expressly stated to be an amendment to the Act of 1897; and chap. 19 does not state whether it is an amendment or not. But both acts are on the same subject, and must be considered together and treated as amendments. And where they expressly repeal the former act, or are in conflict with its provisions, the provisions of the latter act must prevail, unless they are in conflict with vested rights. It is so held in *White v. Hill, supra,* which is expressly put on *Abbott v. Beddingfield,* 125 N. C., 256, and *McCall v. Webb, Ibid.,* 243. And as the plaintiff is not only authorized to perform the duties required by chap. 19, but it is in fact his duty to do so, there can be no reason for applying the provisions of chap. 21; and it is not necessary for us to decide whether it would be valid or not, if it were necessary for us to decide that question.

The fact that the Legislature of 1899 changed the name of "An Act to promote the oyster industry of North Carolina" to that of "Shell-fish Commissioners," did not abolish the plaintiff's office. *White v. Hill,* and *Abbott v. Beddingfield, supra; Wood v. Bellamy,* 120 N. C., 212. Nor does the fact that the Act of 1899 changed the name of the plaintiff's office from that of "Chief Inspector" to that of "Chairman of the Shell-fish Commission," oust the plaintiff from his office, or deprive him of his salary. *Wood v. Bellamy,* and *Abbott v. Beddingfield, supra.*

The plaintiff being entitled to his office and to the salary attached thereto, what is his salary under the legislation as it now exists, and how is he to get it?

Under chap. 19, of the Act of 1899, it seems to us that it has been reduced to $400 per annum and five cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum. We can not say that this reduction was not made for the public benefit, and we have no power to change it, and no disposition to do so, if we had. The re-

duction may be made. *Gales v. Bunting,* and *Hoke v. Henderson, supra; White v. Murray,* at this term.

Then what is necessary to be done to enable the plaintiff to draw his salary? The Act of 1897 did not give specific directions as to this. The Act of 1899, chap. 19, sec. 9, provides that this shall be done upon the warrant of the Auditor, "which warrant shall be issued by the Auditor upon the certificate of the Secretary of said Board, and countersigned by the chairman of the Shell-fish Commission." This was only a matter of detail, which seems to have been proper to supply a defect in the Act of 1897, and was passed when it was thought that Hill and his force would be in office. And we can not, and do not, construe this paragraph to mean that the incumbent should not receive any salary for his services. This, in our opinion, would be to construe the act to mean what we think the Legislature could not do (*Cotten v. Ellis, supra*), and it would also be to construe it to mean what it does not say, and what we do not think the Legislature intended it to mean.

So, if this direction as to the manner of issuing the warrant can not be literally complied with, *in hic verbis,* it should be complied with "as near as may be;" that is, the certificate should be issued by the clerk of the present board and countersigned by the plaintiff who is acting as chairman, in place of Hill, and the Auditor's warrant should issue upon this certificate.

This opinion might close here, and would do so, but for the arguments urged in opposition to the views we have expressed, some of which, it seems to us, should be noticed.

It is said that chap. 19 names certain persons as commissioners, and that the plaintiff is not one of those named in the act. This is true. But the act does not provide that the salary shall be paid to these parties, *eo nomine,* but to the commissioners performing the duties prescribed by the act. Suppose any or all of the commissioners named in chap. 19

had died or resigned, is it contended that still they should receive the salary, or that the work should stop and the commission fall through and fail on that account? They are out, and so far as we know, are not claiming any pay.

It was said this Court had no jurisdiction of this matter; that it only has appellate jurisdiction; that the assumption of such jurisdiction is unheard of; that the judgment of the Court will be *ultra vires,* unlawful, unconstitutional and void, and that the Legislature may declare it unconstitutional; and if it should do so, and the Treasurer should obey the judgment of this Court, he might be in danger. This argument seems to proceed upon the idea that this proceeding was commenced in this Court, whereas the record shows that it is here on appeal from the Superior Court of Perquimans County. And it would seem that the slightest examination would have shown that it is not a proceeding unheard of before.

In *Marbury v. Madison,* 1 Cranch, 49, which was mandamus against James Madison, Secretary of the United States, it was held that the action would lie.

In *Cotten v. Ellis,* 52 N. C., 545, which was a proceeding in mandamus by Cotten, claiming a salary as Adjutant-General of North Carolina, against John W. Ellis, Governor of North Carolina, it was held that the action would lie, and the writ was issued.

But a more recent case is that of *Granville County Board of Education v. State Board of Education,* 106 N. C., 81, in which it was held that the action would lie, and the writ was granted.

The opinion of the Court in that case was written by Justice Clark, and seems to be a direct authority for issuing the writ in this case.

The opinion in *Cotten v. Ellis, supra,* is not only authority for granting the writ, but it would be well to note what the Court says, near the close of the opinion, with regard to the

execution of the writ, which is in these words: "We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question." The opinion (*Cotten v. Ellis*) also contains this language: "A statute which reduces a salary during the term of office, and one which takes away the salary altogether, stand on different footings, for in the latter case, the object would evidently be to starve the incumbent out of his office, and thereby do indirectly what could not be done directly, so as to make applicable the remarks made in the case of *Hoke v. Henderson,* in which there seems to be much force, that such indirect legislation is as obnoxious to the charge of being unconstitutional as an act directly depriving one of his office. A proper constructon of the statute does not lead to the inference that it was the intention to abolish the salary, in the event that the applicant still continued entitled to the office and liable for the discharge of its duties. On the contrary, the clause which repeals so much of the 9th section as relates to the salary is a mere corrollary or incident to the clause which repeals so much of that section as relates to the appointment of the Adjutant-General, and consequently the one can not, by any rule of construction be made to extend in its operation further than the other."

To hold otherwise, the Court says, "would be to place the Legislature in this attitude—we mean to abolish the office; if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary."

The facts in *Cotten v. Ellis* are so nearly the same as the facts in this case, is our excuse for quoting so much of the opinion.

Before the suggestion that the Legislature may declare the opinion of this Court unconstitutional may be adopted by

anyone, we ask them to read the opinion of Chief Justice MARSHALL in the case of *Marbury v. Madison, supra.* It is a full and complete answer to this suggestion. We would like to incorporate the whole of that opinion in the opinion of the Court in this case; but as this is impossible, we will again have to ask to be pardoned for making some quotations from this very able opinion, emanating from the mind of probably the greatest jurist this country has produced. It fully sustains the doctrine of *Hoke v. Henderson,* 15 N. C., 1, that an office is property—a vested right—of which he can not be deprived. It discusses the relation of the government to the citizen, the supremacy of the Constitution over ordinary legislative acts, the relation of the executive, legislative and judicial departments of the government, and shows that all three of these departments are equally bound by the Constitution, but within their own deparments; that while it is the exclusive right of the legislative department to enact laws and the duty of the executive to enforce them, it is the exclusive right of the judiciary to construe them, and to say whether they are repugnant to the Constitution or not. The idea that the executive or the legislative department has any right to put a different construction on a statute or a different construction on the Constitution than the Court has, is utterly repudiated. On page 59 (1 Cranch), it is said: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights." And on page 61, it is said: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the law of his country for a remedy."

On page 62: "The question whether a right has vested

or not is in its nature judicial and must be tried by the judicial authority."

On page 64: "What is there in the exalted station of the officer, which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but upon particular acts of Congress and the general principles of Law?"

On page 66: "The doctrine therefore now advanced is by no means a novel one."

On page 67: "If Congress remains at liberty to give this Court appellate jurisdiction, when the Constitution has declared their jurisdiction shall be original, and original jurisdiction when the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance."

On page 69: "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own illimitable. * * * If an act of the Legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the Court and oblige them to give it effect? Or in other words, though it be no law, does it constitute a rule as operative as if it was a law?"

On page 70: "It is emphatically the province and duty of the judiciary to say what the law is (the italics are ours). * * * So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide the case conformably to the law, disregarding the Constitution, or conformably to the

Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We can not quote all of this very able and exhaustive opinion, but we trust that we have quoted sufficiently from it to establish the separate independent jurisdiction and power of courts to decide the law, and to show that neither the executive nor the legislative department has any such power.

Our opinion then is, that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899, chap. 19 (and the same that Hill would have been entitled to if he had remained in office), to be paid by the Treasurer of the State, out of the oyster fund appropriated by the Act of 1897, and the Act of 1899, admitted to be now in his hands: *Provided,* That the expenses of this commission do not exceed the sum of $6,000 per annum, and that the certificate and warrant shall be issued in the manner we have indicated.

This action is to recover the salary of a public officer. The facts are agreed, and from these facts it appears that there is now money in the hands of the Treasurer, more than sufficient to pay the plaintiff, which arose from the oyster fund, under the acts of 1897 and 1899. That this fund is specially appropriated to the payment of the salaries of officers serving under the Act of 1899; that the Auditor and Treasurer are honest men, and faithful public officers and want to do their duty. They wanted the opinion of the Court as to what that was, and neither of them nor their counsel made any objection to both being defendants; but it is made, and it would seem that the party making it can see no difference between the salary of a public officer and a claim against the State, nor can he see the distinction between *Garner v. Worth* and *Cotten v. Ellis.*

The judgment of the Court below will be modified in con-

formity with this opinion, and being so reformed, judgment will be entered in this Court.

Modified and affirmed.

DOUGLAS, J., concurring. I shall be glad indeed when all the office-holding cases are finally decided, not only from their intrinsic difficulty, but more so from the vast amount of discussion to which they have given rise. Much of this discussion, viewed from my standpoint, has seemed irrelevant, and indeed liable to mislead. Hence upon one or two occasions I have felt compelled to explain myself in a concurring opinion, as I did not wish to be misunderstood upon important constitutional questions. My personal views are fully set out in *Wilson v. Jordan,* 124 N. C., 707, and *Green v. Owen,* 125 N. C., 212.

I have given this case most careful consideration, especially in view of the division of opinion, and I see no reason to overrule the unanimous opinion of this Court as expressed in *Wood v. Bellamy,* 120 N. C., 212. If I follow that opinion to its necessary and legitimate results, I am forced to concur with the Court in the case at bar. In fact, the case as now before us presents no substantial difficulties to my mind. Whatever complications may have existed were solved when we decided that the plaintiff was entitled to the office. The only question now before us is whether he shall receive the compensation which the Legislature attached to the performance of its duties. We are not creating any office, for the office was admittedly created by the Act of 1897, and it does not appear to us that it was abolished by the Act of 1899. We are not affixing any salary to the office further than that we find expressly provided in the Act of 1899—the last expression of legislative will. We are not levying any public taxes, nor appropriating any public money.

This was done to the fullest necessary extent by both acts. That of 1897 raised and appropriated to the specific purposes

of this case an ample fund, much of which still remains in the Treasury unexpended and not otherwise appropriated. The case comes before us on facts agreed, and it is expressly stated that "the State Treasurer has on hand of the oyster fund collected under the provisions of chap. 13, Laws 1897, and chap. 19, Laws 1899, an amount sufficient and available for the payment of such salary and travelling expenses as the plaintiff may be entitled to." No one else is now claiming it, and no one else is now performing the duties which would entitle him to receive it.

The only reason given why it should not be paid to the plaintiff is a construction of sec. 1, chap. 21, Laws 1899, which, it seems to me, would ascribe to the Legislature most unworthy motives. This section provides that "the Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shell-fish industry, unless such person or persons are authorized to render such services under the provisions of the said act." (Chap. 19, Laws 1899.)

We are asked who are authorized to render such services under said act? Plainly the person or persons rightfully performing the official duties prescribed by that act. Can we say that the primary object of the Legislature was not the public welfare, but the private benefit of the individuals named in the act? Have we any right to say that the Legislature, in providing for the protection and supervision of one of the great industries of the State, intended to say to the Treasurer, "We think that the proper supervision of the shell-fish industry is necessary for the public welfare, and for this purpose we have appropriated the public money, but if that public money can not go into the pockets of our personal friends whom we have named in the bill, we prefer that those important public duties should remain unperformed and those great public interests entirely neglected." The Legislature has not said so; it could not legally say so,

and it shall not be made to say so, even inferentially, by any construction of mine. It is my duty as well as my pleasure to place upon its acts a construction in harmony with the public interests which they are bound to protect, and the Constitution which they are sworn to obey. They may well have believed that the office held by the plaintiff had been legally abolished, and that they had the right to fill the offices they had presumably created. So believing, they may have intended simply to instruct the Treasurer not to pay any mere claimant under any other act, but if he could not pay their appointees, to hold the fund until it was legally determined to whom it should be paid. Such would have been their legal intent, and such I prefer to believe was their actual intention.

Of course I would deeply regret to see my native State visited by earthquakes or cyclones of a civil or material nature, and I am glad to say they have no germ in the decision we are rendering. This case is a small one, actually and potentially. It enunciates no new principle, and involves but little money. Construing the two acts together, we find an office created by the Legislature with a salary attached thereto and a fund specifically appropriated for the payment thereof. All we now say is, that the man legally and rightfully performing the duties of the office is entitled to the compensation thereunto affixed by law.

NORTH CAROLINA—Supreme Court.

No. 18, Perquimans County.

Theophilus White

against

H. W. Ayer, Auditor, and W. H. Worth, Treasurer of North Carolina.

JUDGMENT.

This cause coming on to be heard, it is adjudged that the plaintiff is entitled to the salary and compensation provided

for in the Act of 1899, chap. 19, to-wit, the sum of four hundred dollars per annum, and five cents per mile travel, when engaged in his work, and extra expenses not to exceed fifty dollars per annum, and that the same be paid by the Treasurer of the State out of the oyster fund appropriated by the Act of 1897 and the Act of 1899, admitted to be now in the Treasurer's hands: *Provided, however,* That the expenses of the commission do not exceed the sum of six thousand dollars per annum.

It is further adjudged that the certificate and warrant shall be issued in the manner indicated in the opinion filed in this action, and that the defendants pay the costs of appeal.

W. T. Faircloth,
Chief Justice.

The respondents deny that in rendering the said opinion, and in conferring upon the Clerk by the judgment in said controversy the authority and power to issue the said writs, or in any manner or thing connected therewith, they were unmindful of the duties of their office, or their oaths of office, or of the Constitution and laws of North Carolina; and they deny that the said writs of mandamus were unlawfully issued, or that the warrant set out in the said article was unlawfully paid by the Treasurer, or that it was paid without any appropriation having been made therefor by the General Assembly of the State. These respondents further deny that the said writs of mandamus were issued with the intent thereby to compel the payment of any money out of the State Treasury, in violation of any provision of the Constitution or laws of the State, or that the same were caused to be issued with any wrongful, improper or unlawful intent whatsoever; but on the contrary these respondents solemnly declare that in all their acts and conduct relative to the issuing of the said writs, or any matter pertaining thereto, they were actuated and

governed by a purpose and desire to discharge the duties of their office honestly, faithfully and conscientiously, agreeably to their oaths of office and in conformity with the Constitution and laws of the State, and that all allegations in said article, or in any of said articles exhibited against them, charging these respondents with any unlawful or improper act or motive in any way connected with the performance of their official duties in connection with the case of *White v. Auditor,* or any other case, are utterly untrue and are emphatically denied; and these respondents solemnly deny the allegation made in the said first article that they committed or were guilty of a high crime and misdemeanor in office.

ANSWER TO ARTICLE II.

And for answer to the said second article these respondents say, that they abide by their answer to the said first article in so far as the same is responsive to the allegations contained in the said second article, and without here again repeating the same answer, pray the same to be taken as answer to this second article, as fully as if here again set out at length; and as to the new allegations contained in the said second article, that these respondents and William T. Faircloth, constituting a majority of the Supreme Court of North Carolina, "did usurp legislative authority and did assume to themselves legislative functions; and, intending to bring the General Assembly of North Carolina into disrepute, public scandal and disgrace, unmindful of the high duties of their office as members of the Supreme Court of North Carolina, and of their oaths of office, and in contempt, disregard and defiance of the provisions of chap. 21, Public Laws of North Carolina, session of 1899, did, under color of their aforesaid offices unlawfully, wrongfully and in violation of any provision of the Constitution of the State of North Carolina, and in disregard and contempt of the acts of the General Assembly afore-

said in the aforesaid controversy of Theophilus White against H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer, pending on appeal in the said Supreme Court of North Carolina and decided by the said Supreme Court at the February Term, 1900, thereof, cause to be issued by Thomas S. Kenan, Clerk of the said Court, the writs aforesaid," these respondents solemnly deny the same and every part thereof.

And as to the remainder of the said article, they repeat their answer to the said first article and deny that the said claim was unlawfully audited and allowed by the State Auditor, and that the warrant for the payment of the said claim was unlawfully issued by the said Auditor and unlawfully paid by the State Treasurer, contrary to the lawful provisions of any act of the General Assembly, or of any provisions of the Constitution of the State of North Carolina, or in disregard and contempt thereof, or with any wilful or wrongful intent whatsoever to compel or require the payment of the said $831.15 out of the State Treasury, and they further deny that the aforesaid mandamus writs were unlawful or contrary to any provisions of the Constitution of the State of North Carolina, or to any act or acts of the General Assembly.

And these respondents solemnly deny the allegation in said second article, that they were guilty of a high crime or misdemeanor in office as in said second article set forth.

ANSWER TO ARTICLE III.

And for answer to said third article, these respondents say, that they abide by their answer to the first and second articles in so far as the same are responsive to the allegations contained in the said third article, and without here again repeating the same answer, pray that the same be taken as an answer to this third article as fully as if here set out at length, and as to the new allegations contained in the said third article, these respondents say:

That it is not true that the Supreme Court of North Carolina adjourned at the February Term, 1900, of said Court, for the term, without directing mandamus writs to issue in the said controversy submitted without action entitled Theophilus White against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, as alleged in said third article; on the contrary these respondents aver that the said Court, before the end of said term, namely, on the 22d day of May, 1900, in its opinion and judgment then rendered and filed in the aforesaid cause, affirmed the judgment of the Court below as modified by the opinion of the Court, directing and commanding the said mandamus writs to be issued, and rendered judgment in accordance with that opinion; and that it was upon such judgment and according to the due and regular course of procedure that said writs were issued.

And as to the further allegation contained in the said third article, that the General Assembly at its adjourned session in June, 1900, passed the resolution set out in said third article, appointing a committee to wait upon the State Treasurer and ascertain from him if he had paid out any money to Theophilus White, and if so, on what authority; and as to the action of the said committee pursuant to the aforesaid resolution, these respondents have no personal knowledge, but suppose that the same is true, as alleged in said article; but they declare, however, that whatever resolution may have been passed, and whatever may have been done by the aforesaid committee, was done after the appeal in the said controversy without action of *White v. The Auditor* had been decided by the Supreme Court of North Carolina, and its opinion and judgment had been rendered therein; and that there was then no longer anything pending before the said Court pertaining to said controversy upon said appeal; and that the issuance of a writ of mandamus, after the entering of a judgment directing the same, devolved upon the Clerk.

The remainder of said third article these respondents sol-

emnly deny; and they further deny the allegation in said third article set forth that they, as Associate Justices of the Supreme Court of North Carolina, did then and there commit and were guilty of a high crime and misdemeanor in office.

ANSWER TO ARTICLE IV.

And for answer to said fourth article, these respondents say, that they abide by their answer to the said first, second and third articles, in so far as the same are responsive to the allegations contained in said fourth article, and without here again repeating the same answer, pray that the same may be taken as an answer to this fourth article as fully as if here set out at length; and as to the new allegations contained therein, these respondents say: That the said writs of mandamus were issued by Thomas S. Kenan, Clerk of the Supreme Court of North Carolina, in conformity to law, according to the orderly course and practice of the Courts, and pursuant to the opinion and judgment rendered May 22, 1900, directing the same to be done.

Answering specification 1, subjoined to said fourth article, these respondents say, that it is true that Art. IV., sec. 9, of the Constitution of North Carolina, does confer upon the Supreme Court "original jurisdiction to hear claims against the State," but these respondents deny that the said controversy of *Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer,* referred to in said specification, involved a claim against the State of North Carolina; on the contrary they aver that it was merely a money demand made by the said Theophilus White, an officer of the State, upon the said Auditor and Treasurer, for the salary due to the said Theophilus White, as such officer, and for the payment of which a sum had been appropriated by the General Assembly; and that it was admitted in the said controversy (as set forth in answer to Art. I.) that it had been col-

lected and was then in the hands of the State Treasurer for the purpose of paying the salary due to the officer under the law, as the Court should construe it; that the said controversy was submitted without action upon an agreed state of facts (as set forth above), to a Judge of the Superior Court of Perquimans County for his decision, the parties thereto making no question as to the proper venue, but seeking only, for their guidance and instruction, a decision of the Supreme Court as to the rights of the plaintiff and the duty of the defendants therein.

That specification 2, of said fourth article, is denied.

That specification 3, of said fourth article is denied.

That specification 4, of said fourth article is denied.

For answer to specification 5, subjoined to said fourth article, these respondents deny that one of the Associate Justices of the said Supreme Court was prevented by the majority of the said Court, including these respondents and the then Chief Justice WILLIAM T. FAIRCLOTH, from filing his dissenting opinion in the said controversy submitted without action, entitled *Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer;* and on the contrary these respondents aver that an opinion was filed by each of the two members of the said Court who dissented from the judgment in said controversy, giving at length their reasons for dissenting from the judgment of the said Court directing the aforesaid mandamus writs to be issued; which dissenting opinions were published in Vol. 126, of the Supreme Court Reports on pp. 587 and 596.

That it is true that at the succeeding term of the Court, about five months after the said controversy had been disposed of and the opinions and judgment therein filed, these respondents and the then Chief Justice WILLIAM T. FAIRCLOTH, at the request of the Clerk of the said Court, did give him their individual opinion that it was his duty to issue the said writs of mandamus when demanded by the plaintiff, in

accordance with the opinion and judgment which had been filed in said cause at the preceding term of the said Court, directing them to be issued; and that it is also true that at the same time two of the Associate Justices of the said Supreme Court told the said Clerk that in their opinion he ought not to issue the said writs; and one of the Associate Justices, namely, Justice CLARK, then asked to have spread upon the minutes of the Court an order from himself alone, directing and instructing the Clerk not to issue the said writs, and also tendered what he termed a dissenting opinion which he had theretofore filed with the Clerk of said Court, and asked that it be printed as such in the volume containing the opinions and dissenting opinions of the Court at the September Term, 1900, of said Court, which will be Vol. 127 of said Reports. And these respondents further say that it is true that they and the then Chief Justice WILLIAM T. FAIRCLOTH, and Associate Justice MONTGOMERY, did object to the said requests, upon the ground that the said appeal in the said controversy entitled as aforesaid, had been decided and disposed of at the preceding term of the said Court and that at said preceding term four opinions had been filed and a final judgment entered therein; and that the said Justice CLARK had at the said preceding term of said Court filed a full and exhaustive opinion dissenting from the opinion and judgment of the Court on the ground that the said judgment ordered and directed peremptory writs of mandamus to issue; which said dissenting opinion, together with the opinion of the Court, had already been published in the Vol. 126 of the Supreme Court Reports, containing the opinions and dissenting opinions rendered at the said February Term, 1900, of said Court.

And these respondents, together with the then Chief Justice WILLIAM T. FAIRCLOTH and Associate Justice MONTGOMERY, further objected to the said requests of Justice CLARK, upon the ground that the said appeal in the said con-

troversy, entitled as aforesaid, having been decided and disposed of at the said preceding term of the said Court, there was therefore nothing before the Court upon which it could act as a Court. And upon the said objections having been made as aforesaid, by the Justices aforesaid, Justice CLARK withdrew the said dissenting opinion and asked that the copies thereof be returned to him.

Further answering said fourth article and the several specifications subjoined thereto, these respondents declare that in their conduct in reference to the matters and things therein alleged, they were governed solely by an honest and conscientious desire to perform their duty as Justices of the said Court; that their course was in accordance with law and the rules of the Court, and that in nothing did they entertain the least desire to be disrespectful to any member of the said Court, or to deprive any member of said Court of any right or privilege to which he was entitled under the Constitution and laws of the State, or under the rules and practice of the said Court.

Further answering the said fourth article, and the several specifications subjoined thereto, these respondents deny the allegations therein set forth that they, as Justices of the Supreme Court of North Carolina, did then and there commit and were guilty of a high crime and misdemeanor in office.

ANSWER TO ARTICLE V.

And for answer to said fifth article these respondents say, that they abide by their answer to the first, second, third and fourth articles, in so far as the same are responsive to the allegations contained in the said fifth article; and without here again repeating the same answers, pray the same to be taken as answer to this fifth article as fully as if here again set out at length; and as to the new allegations contained in the said fifth article, these respondents further say:

These respondents admit that they and Chief Justice WILLIAM T. FAIRCLOTH, now deceased, caused the said writs of mandamus to issue, inasmuch as they concurred in delivering the opinion of the Court in *White v. Auditor,* 126 N. C., 570, wherein they modified and affirmed the judgment of the Court below ordering a peremptory mandamus, and causing judgment to be entered thereon.

It is true that at the last September Term they refused to instruct the Clerk of said Court to issue said writs of mandamus, but this refusal was placed upon the express ground that the action had proceeded to final judgment at a former term of said Court, and that therefore there was nothing before the Court on which it could officially act. Upon application of the Clerk, they severally gave him their individual opinion that the intent and legal effect of the judgment of the Supreme Court in said case was to entitle the plaintiff to the writ of mandamus that was the object of his suit, and that it became the duty of the Clerk of said Court to issue such mandamus in accordance with that opinion upon the application of the plaintiff. These respondents mention these facts simply to exhibit the entire truth of the transaction, and without any intention or desire to shift the responsibility for the issuing of said writs, or to avail themselves of any technical defense. Except as herein set forth, these respondents emphatically deny each and every allegation in said article contained.

They especially deny that in rendering said opinion, or any other opinion by them concurred in, they were actuated by any improper motive whatever, or that they have knowingly or wilfully exceeded their authority in any respect. They further deny that they have ever shown any disrespect to the Legislature, which they have always recognized as an equal and co-ordinate department of the State government, to whose acts they have always given full faith, credit and effect in so far as such acts were not inconsistent with the Consti-

tution, which all branches of the government are equally bound to obey and support. The said case of *White v. Auditor,* in which the said writs of mandamus were issued, did not originate in the Supreme Court, but came before said Court in the due and orderly course of procedure, on appeal by the State Auditor and Treasurer from a judgment rendered in the Superior Court of Perquimans County. There was no suggestion either in the record or by counsel on appeal, or by any member of the Court, of a want of jurisdiction by the Court below, or of the right of the Auditor and Treasurer to prosecute their appeal. It thus became the duty of these respondents, as Justices of said Court, to pass upon the merits of said case and to determine the legal rights of the parties thereto. In rendering judgment therein, these respondents solemnly aver that they acted solely from a sense of duty and in strict accordance with what they honestly believed to be the law of the land. Personally, they neither had nor could have any possible interest in said action directly or indirectly; nor were they subject to any influence whatever, that could in the slightest degree prejudice their judgment. They further solemnly declare that every official act of theirs since they came upon the Bench, in this and in all other cases, has been influenced by the same integrity of purpose and unbiased judgment.

While fully recognizing the rights, powers, and responsibilities of the Legislative and Executive Departments of the State Government, they have always felt, and still feel, that they have no more right to shirk the just responsibilities of their office than they have to exceed its lawful powers; and they deem it their duty to decide all cases properly before them in strict accordance with the legal rights of the respective parties as determined by the Constitution and the laws of the State, not inconsistent therewith. Section 8, of Article IV of the Constitution of this State provides that: "The Supreme Court shall have jurisdiction to review, upon

appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty-eight, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the inferior courts." Section 12 of the same Article, is as follows: "The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a co-ordinate department of the government; but the General Assembly shall allot and distribute that portion of this power and jurisdiction, which does not pertain to the Supreme Court, among the other Courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best; provide also a proper system of appeals; and regulate by law, when necessary, the methods of proceeding in the exercise of their powers, of all the courts below the Supreme Court, so far as the same may be done without conflict with other provisions of this Constitution."

Before entering upon their duties as Justices of the Supreme Court, these respondents, in addition to their oaths of allegiance to the State and Federal Governments, severally took the following oath, as prescribed by Section 3315 of The Code: "I, David M. Furches (or Robert M. Douglas), do solemnly swear that, in my office of Justice of the Supreme Court of North Carolina, I will administer justice without respect to persons, and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office, according to the best of my abilities, and agreeably to the Constitution and laws of the State; so help me God." This oath they took in good faith, and have ever since been mindful of its sacred obligations.

As the final determination on appeal of all "matters of law or legal inference" is committed to the Supreme Court by express provision of the Constitution, as members of that Court, these respondents could not refuse to perform that duty "honestly, faithfully and impartially" without violating their oath.

It may be that they have been mistaken in some of their views of the law; but this they have sought to avoid by a careful consideration of every case, and a steadfast adherence to settled principles of law. They do not claim personal infallibility of judgment, but in all cases and under all circumstances have done the right, as they were given to see the right. More they could not do—less they have not done.

These respondents further declare that in delivering or concurring in the opinions of the Supreme Court in the so-called "office-holding cases," they were actuated solely by a dominating sense of duty and governed by well settled principles of law. They utterly deny that they were influenced by any partisan bias or political purpose. The first of the so-called "office-holding cases" determined by these respondents and the late Chief Justice William T. Faircloth, was not Day's case, which was decided in 1899, but was the case of *Wood v. Bellamy,* decided at the February Term, 1897, and reported in 120 N. C., on page 212. This case of *Wood v. Bellamy,* which clearly laid down the essential principles that have governed the decision of the Court in all subsequent cases, was delivered by a unanimous Court under peculiar circumstances that absolutely excluded any possible intent on the part of the Court to show any disrespect to the Legislature, or to bring it into public contempt or disrepute. The General Assembly was then, and had been for the past two years, under the absolute control of a political party to whose votes every member of the Supreme Court owed his seat upon the Bench. This party had long been out of power, and consequently found practically every place of

honor or profit in the hands of its political opponents. Desiring the fruits of its victory, it sought to obtain possession of such offices by a series of statutes that clearly expressed the Legislative will. Those holding such offices claimed a vested right therein during the terms for which they were appointed, and refused to surrender possession thereof to the appointees of the Legislature. The respondent Furches was elected a Justice of the Supreme Court in 1894, and qualified on the 1st day of January, 1895; while the respondent Douglas was sworn in on the 1st day of January, 1897, having been elected at the preceding election.

Under such circumstances the case of *Wood v. Bellamy,* with the kindred cases of *Lusk v. Sawyer* and *Person v. Southerland,* commonly known as the "Asylum cases," came before the respondents, as members of the Supreme Court, for final determination. Had these respondents been influenced by any motive either of fear or favor, they would have then yielded submission to the will of the Legislature; but across the path which political affiliation and personal friendship would have prompted them to follow, lay the stern mandate of the Constitution and the sacred obligation of their judicial oaths. These cases were ably and exhaustively argued, orally and by brief, by distinguished counsel whose names appear on pages 216 and 225 of Volume 120 of the Reports. After careful consideration the Supreme Court, including these respondents, reaffirmed the constitutional principles decided in *Hoke v. Henderson* (15 N. C., 1), and decided in favor of the official incumbents. These cases involved the directors and officers of the three insane asylums of the State, *Wood v. Bellamy* being for those of the asylum at Raleigh; *Lusk v. Sawyer* for the asylum at Morganton, and *Person v. Southerland* for the asylum at Goldsboro. These cases were heard and decided at the same time, the opinion of the Court being delivered in *Wood v. Bellamy,* and the other two disposed of by per curiam judgments,

120 N. C., 212, 225. The opinion speaks for itself as to the legal principles therein held and the reasons therefor. The practical effect of said opinion was to defeat the will of the Legislature and leave all the public institutions of the State in the hands of a defeated party whose political purposes and opinions were utterly at variance with those of the majority of the Legislature and the Court. This opinion apparently met the almost universal approval of the bar and the people, and was accepted as settling all cases of a similar nature, whether pending or contemplated. The decision was based upon the leading case of *Hoke v. Henderson,* which was decided at the December Term, 1833, of the Supreme Court, and which has been accepted as settled law and uniformly followed by the Court up to the present time.

The opinion therein, written by Chief Justice Ruffin and concurred in by Justices Daniel and Gaston, has been cited with approval by the Supreme Court of this State in more than thirty different cases; and among the Judges writing the said opinions, or concurring therein, appear the names of every Chief Justice who has since presided over this Court, and of all the Associate Justices before whom the question was ever raised, until February Term, 1899, sixty-five years after the rendition of the original opinion. An examination of the constitutional history of the State will show that the principles so clearly enunciated in *Hoke v. Henderson* have not only received the practically unanimous approval of succeeding Judges, but have, by direct implication, been repeatedly ratified by the people themselves. Since this decision was rendered there have been five separate and distinct constitutional conventions, all of which *might,* but none of which *have,* abrogated or modified the principle of that opinion. In addition to these conventions, several constitutional amendments have been made by Legislative action and popular ratification. Even recent Legislatures, knowing the de-

cisions of this Court, and especially the distinction drawn between the cases of *Wood v. Bellamy* and *Caldwell v. Wilson,* have made no attempt to limit in the future the application of the doctrine, or to withdraw any office from its protection.

The case of *Hoke v. Henderson* arose as follows: The office of Clerk of the Superior and County Courts had been established by the law of 1806, and under said law Henderson had been appointed Clerk of said courts for Lincoln County to hold during good behavior. The law of 1832 provided for filling these offices throughout the State by election by the people. Under the provisions of this law Hoke was elected clerk of said courts for Lincoln County, and demanded the office from Henderson, who refused to surrender. On appeal, the Supreme Court decided that Henderson held a vested right of property in his office during the term for which he was appointed, that was during good behavior; and that the Legislature could not thus transfer the office from Henderson to Hoke. The essential principles involved can best be stated by the following extracts from the opinion, in the words of Chief Justice Ruffin: "The act transfers the" "office of Clerk from one of these parties to the other, with-" "out any default of the former, or any judicial sentence of" "removal. The question is, whether this legislative inten-" "tion, as ascertained, is valid and efficacious, as being within" "the powers of the Legislature in the constitutions of the" "country; or is null, as being contrary to and inconsistent" "with the privisions of those instruments. To the determi-" "nation of this question the judicial function is competent." "It involves no collateral considerations of abstract justice" "or political expediency. It depends upon the comparison" "of the intentions and will of the people as expressed in" "the Constitution, as the fundamental law, unalterable ex-" "cept by the people themselves, with the intentions and will"

"of the agents chosen under that instrument, to whom is"
"confided the exercise of the powers therein delegated or not"
"prohibited. Such agents are all public servants in this"
"State; and the agency is necessarily subordinate to the"
"superior authority of the Constitution, which emanated"
"directly from the whole people. Legislative representa-"
"tives may order and enact what to them may seem meet and"
"useful, upon all subjects and in all methods, except those"
"on which their action is restrained by the Constitution;"
"and such order and enactment is obligatory alike on all cit-"
"izens, including those who are by a public duty to execute"
"the laws, as well as those on whom they are to be executed."
"Courts therefore must enforce such enactments; for they"
"are laws to them by the mere force of the legislative will."
"But when the representatives pass an act upon a subject"
"upon which the people have said in the Constitution, they"
"shall not legislate at all; or when upon a subject on which"
"they are allowed to legislate, they enact that to be law"
"which the same instrument says shall not be law, then it"
"becomes the province of those who are to expound and en-"
"force the laws, to determine which will, thus declared, is"
"the law. Neither the reasons which determined the will"
"of the people on the one hand, nor the will of the represen-"
"tatives on the other, can be permitted to influence the mind"
"of the Judge upon the question, when reduced to that sim-"
"ple point. His task is the humbler and easier one of in-"
"stituting a naked comparison between what the representa-"
"tives of the people have done, with what the people them-"
"selves have said they might do, or should not do; and if"
"upon that comparison, it be found that the act is without"
"warrant in the Constitution and is inconsistent with the"
"will of the people as there declared, the Court can not exe-"
"cute the act, but must obey the superior law, given by the"
"people alike to their judicial and to their legislative agents."

* * * * * * * *

"But even these sanctions are not sufficient to overturn"
"the Constitution, if the repugnance do really exist and is"
"plain. For although the imputation is altogether inad-"
"missible, that the Legislature intend wilfully to violate the"
"the Constitution, and still less that the people themselves"
"contemplate violence to the instrument consecrated by their"
"own voices and the consent of our ancestors; yet all men"
"are fallible, and in the dispatch of business, the heat of con-"
"troversy, and the wish to effect a particular end, may inad-"
"vertently omit to scrutinize their powers, and adopt means,"
"adequate indeed to the end, but beyond those powers. It"
"ought not to surprise that such an event should sometimes"
"happen." * * *

"When, unfortunately, such instances do occur, the pre-"
"servation of the integrity of the Constitution is confided"
"by the people, as a sacred deposit, to the Judiciary. In"
"the discharge of that duty, the approbation of the Legisla-"
"ture itself is to be anticipated; for the principle of virtue"
"which restrains them from a known and willful violation"
"of it, will induce them to rejoice at the rescue of the"
"Constitution from their own incautious and involuntary in-"
"fraction of it. It remains now to enquire, whether the"
"act under consideration be of that character." * * *

"In other words, public liberty requires that private prop-"
"erty should be protected even from the government itself."

"The people of all countries who have enjoyed the sem-"
"blance of freedom, have regarded this and insisted on it"
"as a fundamental principle. Long before the formation"
"of our present Constitution it was asserted by our ancestors"
"on various occasions; and, in one sense of it, its vindication"
"produced the Revolution. At the beginning of that strug-"
"gle, while the jealousy of power was strong, and the love"
"of liberty and of right was ardent, and the weakness of the"
"individual citizen against the claims of unrestricted power"

"in the government was consciously felt, the people formed"
"the Constitution of this State; and therein declared 'that
"no freeman ought to be taken, imprisoned or disseized of"
"his freehold, liberties or privileges, or outlawed or exiled,"
"or in any manner destroyed, or deprived of his life, liberty"
"or property, but by the law of the land.' (Bill of Rights,"
"s. 10.) By the fourth section it is declared, 'that the leg-"
"islative, executive and supreme judicial powers of govern-"
"ment ought to be forever separate, and distinct from each"
"other.' "

"In absolute governments, whether hereditary or repre-"
"sentative, the division of the powers of government is un-"
"important; because that body in which resides the superior"
"authority can, at will, make it supreme and absorb all the"
"other departments. It does not follow, therefore, that be-"
"cause the British Parliament, whose supremacy is acknowl-"
"edged, decides questions of private right and puts that"
"decision, as it does its other determinations, into the form"
"of a statute, that whatever it does is legislative in its"
"nature. It can adjudicate and often does substantially"
"adjudicate, when it professes to enact new laws. That fac-"
"ulty is expressly denied to our Legislature, as much as"
"legislation is denied to our Judiciary. Whenever an Act"
"of the Assembly therefore is a decision of titles between"
"individuals, or classes of individuals, although it may in"
"terms purport to be the introduction of a new rule of title,"
"it is essentially a judgment against the old claim of right;"
"which is not a legislative, but a judicial function."

* * * * * * * *

"The sole inquiry that remains is, whether the office of"
"which the act deprives Mr. Henderson is property. It"
"is scarcely possible to make the proposition clearer to a"
"plain mind, accustomed to regard things according to prac-"
"tical results and realities, than by barely stating it. For"

"what is property; that is, what do we understand by the"
"term? It means, in reference to the thing, whatever a per-"
"son can possess and enjoy by right; and in reference to"
"the person, he who has that right to the exclusion of others,"
"is said to have the property. That an office is the subject"
"of property thus explained, is well understood by everyone,"
"as well as distinctly stated in the law books from the ear-"
"liest times. An office is enumerated by commentators on"
"the law among incorporeal hereditaments; and is defined"
"to be the right to exercise a public or private employment,"
"and to take the fees and emoluments thereunto belonging.
("2 Bl. Com., 36.)" * * *

"But with these limitations and the like, a public office"
"is the subject of property, as every other thing corporeal or"
"incorporeal, from which men can earn a livelihood and"
"make gain. The office is created for public purposes; but"
"it is conferred on a particular man and accepted by him"
"as a source of individual emolument. To the extent of"
"that emolument it is private property, as much as the land"
"which he tills, or the horse he rides or the debt which is"
"owing to him. Between him and another man, none will"
"deny the right of property. For if one usurp an office"
"which belongs to another, the owner may have an action"
"for damages for the expulsion, for the fees of office re-"
"ceived, and a remedy by *quo warranto* to enquire into the"
"right of the usurper, and by mandamus to be himself re-"
"stored. When we find these remedies established to en-"
"force the right of admission into office, to secure the pos-"
"session of it and its emoluments, we can no longer doubt"
"that in law, an office is deemed the subject of property and"
"valuable property to the officer, as well as an institution"
"for the convenience of the people. If it be so, it falls"
"within those provisions of the Constitution which secure"
"private interests; and can not be divested without some de-"
"fault of the officer, or the cesser of the office itself."

"These are the general principles that lead the Court to"
"the conclusion that the Act of Assembly is invalid."

In *Cotten v. Ellis,* 52 N. C., 545, the plaintiff Cotten had been appointed Adjutant-General for three years, with a salary of $200. The Legislature passed an act repealing the law under which Cotten had been appointed, both as to his appointment and salary. Cotten served out his term and demanded pay, which the Governor, Ellis, refused. The Supreme Court decided that he was entitled to it, and to a mandamus upon the Governor to enforce its payment. Chief Justice Pearson, delivering the opinion of a unanimous Court, concurred in by Justices Battle and Manly, says in part:

"The legal effect of the appointment was to give the office"
"to the applicant, and he became entitled to it as a 'vested"
"right' for the term of three years, from which he could only"
"be removed in the manner prescribed by law, and of which"
"the Legislature had no power to deprive him. This is set-"
"tled; *Hoke v. Henderson,* 4 Dev., 1. So, the act of 1858,"
"can not have the effect contended for, even if, in the ab-"
"sence of express words, we were at liberty to infer that"
"such was the intention, and its only effect is to take from"
"the Governor the right of filling future vacancies and vest"
"it again in the Legislature." * * *

"A statute, which reduces a salary during the term of"
"office, and one which takes away the salary altogether,stand"
"on a different footing, for, in the latter case" the object"
"would evidently be to starve the incumbent out of his office,"
"and thereby do indirectly what could not be done directly."
"So as to make applicable the remarks made in the case of"
"*Hoke v. Henderson, supra,* in which there seems to be"
"much force, that such indirect legislation is as obnoxious"
"to the charge of being unconstitutional as an act directly"
"depriving one of his office." * * *

"Having arrived at the conclusion that the applicant is,"
"by law, entitled to the salary claimed by him; the solution"
"of the second question is an easy one, for as there is a legal"
"right, the courts, as a matter of course, have power to en-"
"force it. The power of a court, by the writ of mandamus,"
"to compel an executive officer to do an act merely minis-"
"terial, in order to enforce an ascertained legal right, is set-"
"tled by the cases of *Marbury v. Madison,* 1 Cranch, 64, and"
"*Kendall v. United States,* 12 Peters, 834."

In *King v. Hunter,* 65 N. C., 603, the Legislature passed an act on February 2, 1871, authorizing the Board of Commissioners of Lincoln County to appoint a tax collector for said county.

The sheriff, King, brought an action for the tax lists, claiming that the said act was unconstitutional in as much as it took away from him the greater part of his office in which he had a vested right of property. The Supreme Court held the said act unconstitutional on the ground that there was a contract between the sheriff and the State that he would discharge the duties of his office, which could not be abrogated or impaired except by the consent of both parties. Justice Reade, delivering the opinion of a unanimous Court, concurred in by Chief Justice Pearson and Justices Rodman, Dick and Boyden, says in part as follows:

"Nothing is better settled than that an office is property."
"The incumbent has the same right to it that he has to any"
"other property. There is a contract between him and the"
"State that he will discharge the duties of the office—and"
"he is pledged by his bond and his oath; and that he shall"
"have the emoluments—and the State is pledged by its"
"honor. When the contract is struck, it is as complete and"
"binding as a contract between individuals; and it can not"
"be abrogated or impaired except by the consent of both par-"
"ties. We do not wish to be understood as holding that"

"there is any iron rule of construction of the details of the"
"contract; on the contrary, there must be some flexibility to"
"suit the public convenience and the convenience of the offi-"
"cer, such as would be implied from the nature of the con-"
"tract, and such as circumstances make necessary, *ex. gr.*"
"that if it happened that the emoluments are so inadequate"
"that for them the officer can not afford to serve the public,"
"they may be increased, or if they be so extravagant as to"
"be burdensome to the public, they may be diminished."
"But this must be done in good faith and in fair dealing,"
"and with no view to evade, or directly or indirectly to im-"
"pair the substance of the contract. Nothing needs to be"
"better guarded than contracts with public officers; for al-"
"though it is not to be supposed that the Legislature will be"
"influenced by any but pure motives, yet as officers, and offi-"
"cers are of necessity connected with political parties, and"
"are, insensibly, the objects of favor or prejudice, it is wise"
"to protect the public against the former and the officer"
"against the latter. It is well known that the commissions"
"for collecting taxes is an important, and, in many counties,"
"the principal part of the emoluments of the office of sheriff."
"Lincoln is a small county, and probably one-half of the"
"sheriff's emoluments are from taxes. There is no allega-"
"tion that the emoluments are large to the oppression of the"
"public. If they were so, the evil might have been rem-"
"edied without a violation of the contract, by a general law"
"reducing the fees of sheriffs. But even in that way it is"
"at least questionable whether the Legislature could have"
"deprived him of all commissions for the collection of taxes"
"—certainly not unless the emoluments were extravagant"
"and burdensome, and then the reduction, or deprivation,"
"must have been for that reason. But here, there is no such"
"execuse. The Legislature without explanation and with-"
"out apparent necessity, and, therefore, in contemplation"

"of law, wantonly, takes the duties and emoluments from"
"the sheriff, and creates a new officer, and gives them to"
"him! The error is so palpable, that, but for the respect"
"due to the Legislature, whose act we are reviewing, and"
"must sustain unless plainly unconstitutional, we should"
"think it unnecessary to encumber the case with authorities."

In *Bunting v. Gales,* 77 N. C., 283, while the Supreme Court held the Act of the Legislature to be constitutional, the opinion, delivered by Justice Rodman and concurred in by Chief Justice Pearson and Justices Reade, Bynum and Faircloth, says in part:

"It is admitted that a lucrative public office is private"
"property, of which no one can be divested except by the"
"law of the land; and it may also be admitted so far as this"
"case is concerned, that after a law has once fixed the ten-"
"ure of the office, a subsequent Act of the Legislature can"
"not alter the tenure to the detriment of persons then in"
"office; *e. g.* by converting it from an office during good be-"
"haviour, or for four years, into an office for two years."
"This was the decision in *Hoke v. Henderson,* and in *Tay-*"
"*lor v. Stanley,* 4 Dev. 1, 31.

"It may also be admitted that the Legislature can not"
"select a particular officer, and by a special law applicable"
"to him alone, deprive him of any material part of his duties"
"and emoluments. This partakes of the nature of a judi-"
"cial forfeiture without a trial. This was the case of *King*"
"*v. Hunter,* 65 N. C., 603. Neither can the Legislature"
"take away the entire salary of an officer. *Cotten v. Ellis,*"
"7 Jones, 545."

In *Bailey v. Caldwell,* 68 N. C., 472, the plaintiff was appointed a Code Commissioner, and during his term the Legislature of 1870-71 passed an Act purporting to repeal the ordinance of the Convention under which he was appointed. The Supreme Court unanimously held that such

State Library.

act was unconstitutional, and that the plaintiff Bailey was entitled to his compensation for his entire term of office, and that a peremptory writ of mandamus should issue requiring the Governor to pay it.

On the argument in *Wood v. Bellamy,* which was heard and decided at the same time with *Lusk v. Sawyer* and *Person v. Southerland,* the plaintiffs themselves admitted the authority of *Hoke v. Henderson,* but contended that it did not apply, inasmuch as the Legislature had, in chapter 265, Laws of 1897, *in express terms* repealed the charters of the different hospitals and asylums, and *abolished* the offices held by the defendants. The defendants contended on the other hand that while the Legislature had directly and in express words repealed the charters and abolished the offices, such repeal and abolition were only colorable, inasmuch as the hospitals were immediately re-chartered and similar offices re-created.

The following extracts are from the brief of the defendant's counsel in *Lusk v. Sawyer,* which was for the possession of the offices of the Morganton asylum:

"The purpose of the Legislature, on its face, is to get the"
"old officers out. No legitimate public policy is subserved"
"by calling an old established institution Western Hospital"
"instead of State Hospital, changing its official board from"
"nine directors to nine 'trustees,' and its Superintendent"
"into a 'President' and 'Resident Physician.' All the duties"
"remain the same. The changes were all so trifling that"
"there is no escape from declaring what everybody knows,"
"that the acts were intended to get rid of the officers, and"
"nothing more.

"The case of *Soon Hing v. Crawley,* 113 U. S., 703, re-"
"lied on by plaintiffs, is broad enough to allow an enquiry"
"here: 'The rule is general, with reference to the enact-"
"ments of all legislative bodies that the Courts can not in-"

"quire into the motives of the legislators in passing them,"
"except as they may be disclosed on the face of the acts, or"
"inferable from their operation, considered with reference"
"to the condition of the country and existing legislation.'"
"In the light of this rule, the purpose is manifest. A State"
"Department was efficiently officered, and well conducted."
"A change of political parties had taken place; and it was"
"desired that all the old incumbents should give way to men"
"of the dominant faith. All this may be inferred from the"
"operation of the acts 'considered with reference to the con-"
"dition of the country and existing legislation." * * *

"We submit that the proper construction of the act will"
"simply give it a prospective operation, change the name of"
"the institution and its officers, but leave all officers to serve"
"out their time. The act is plainly a modification or"
"amendment of the old law; and any unnecessary parts of"
"it, such as the impossible requirement for organizing on"
"the 9th of March (the day the nominations were sent in)"
"must give way to the true state of the case.

"If this rule is adopted, there is animadversion on the"
"Legislature. But if this can not be applied, there is no"
"escape from the conclusion that the statute was merely"
"intended to get rid of the present officers.

"We do not mean to inquire into the private motives of"
"the members, and to allege that they were not actuated by"
"what they considered public motives. That is an inquiry"
"into which we may not enter. But we do say that the"
"purpose of this act, when viewed in connection with the"
"history of the times, is to change the officers of the asy-"
"lums."

The following extracts are from the brief filed by the counsel for the defendants in the case of *Person v. Southerland,* for the possession of the offices of the Goldsboro asylum:

"I. The defendants admit the power of the Legis-"

"lature to repeal the charter, and thus to destroy the institu-"
"tion, and to abolish the office of Superintendent and Di-"
"rector, and thus put an end to their tenure.

"II. The question then for the Court is to decide whether"
"they have done this.

"III. The defendants deny that the Legislature has the"
"right or power to leave the offices in existence and transfer"
"them from Jno. F. Miller and the Board of Directors, to"
"Abner Alexander and the Board of Trustees named under"
"the new act.

"IV. It will, therefore, be important for the Court to"
"consider whether the offices have been left in existence,"
"and whether the Legislature has endeavored to transfer"
"them to the plaintiffs.

"V. To do this it will be necessary to consider the iden-"
"tity of the institution and of the offices."

* * * * * * * *

"It being apparent that the effect of the legislation con-"
"tained in this bill was not to repeal the charters, or destroy"
"these institutions, but, at most to change their names, and"
"hardly that, with reference to the Eastern Hospital, let us"
"see whether it has the effect to abolish the offices, and put"
"an end to the tenure of the officers? It is true that section"
"5, of said bill, says: 'That the office of Superintendent of"
"the Eastern North Carolina Hospital, North Carolina In-"
"sane Asylum, and the North Carolina Hospital for the"
"Insane, are hereby abolished,' but the same reasoning with"
"reference to the repeal of a statute must be applicable to"
"the abolishment of an office; and, if it can be seen from the"
"bill that the office is not abolished, it is not abolished, even"
"though the act expressly says that it is. It is true the"
"name may have been changed to 'President and Resident"
"Physician,' and the name of Directors changed to Trustees,"
"but the offices have not been abolished."

* * * * * * * *

"Applying the reasoning of this, one of the first courts" "of the world (New York Court of Appeals), to our case, it" "does seem that we must conclude that Superintendent and" "President and Resident Physician, must be one and the" "same office. They have the same functions and duties, and" "the additional duties such as may be prescribed by the" "Board of Trustees, if it change the law at all, 'surely can" "not make it a new office,' and that it does not change the" "law is apparent from sections 2247 and 2254 of The Code," "which empower the Directors to direct, manage, and make" "by-laws for the institution, which may, and do prescribe" "such duties for the Superintendent as is thought advisable," "not enumerated in The Code. If they can thus be made" "new, the ruling in *Hoke v. Henderson* and in all cases in" "our Supreme Court since that time, that an office can not" "be taken from one and given to another by legislative ac-" "tion, 'may readily be made a mere nullity.' "

"It having been thus demonstrated that the charters of" "the hospitals have not been repealed, nor the institutions" "destroyed, nor the offices of Director and Superintendent" "abolished, the defendants contend that the Legislature did" "not have the right or power to transfer these offices to oth-" "ers, their terms not having expired."

"In support of this contention, we need hardly cite any" "other authority than that of *Hoke v. Henderson*, 4 Dev. 1."

These respondents, concurring with a unanimous Court, held with the defendants, that while the Legislature had, in express words professed to abolish the offices held by the defendants, it had not done so in legal effect, and therefore could not deprive the defendants of their legal tenure therein. To that extent the decision in *Wood v. Bellamy* was an extension of the doctrine of *Hoke v. Henderson* to cases of colorable abolition, as there was no attempt by the Legislature to abolish the office held by Henderson, but simply to make it

elective by the people. This extension was in no sense a change of the principle, but simply an application of the same principle to a different but not inconsistent state of facts. For such an application ample citation of authority was furnished by the counsel for the defendants, who especially relied on *King v. Hunter,* 65 N. C., 603; *Cotten v. Ellis,* 52 N. C., 545, and *Bailey v. Caldwell,* 68 N. C., 472.

Two years later, at its February Term, 1899, the Supreme Court, including these respondents, was called on to decide a class of cases substantially identical in principle with each other, and not essentially differing from *Wood v. Bellamy.* These cases are reported in Vol. 124 of the Supreme Court Reports, and while differing somewhat in minor particulars, all practically depended upon the leading cases of *State's Prison v. Day,* and *Abbott v. Beddingfield.* With the reversed political relation of the parties this Court had no concern. It had unanimously declared the law upon constitutional principles in *Wood v. Bellamy,* and a majority of its members, in the absence of any change in the Constitution, saw no reason to change their construction of its mandatory provisions. What was the organic law in 1897 remained the law in 1899; and all parties who invoked its protection were entitled to its equal application. These respondents had concurred with a unanimous Court in holding that Bellamy and his co-defendants were entitled to retain their offices for their vested terms, in spite of the fact that the Legislature of 1897 had professedly abolished their offices; and these respondents decided the same in favor of Day and Abbott. The principal difference was that in Day's case the office of Superintendent was abolished in terms, and its duties by the same act transferred substantially to an Executive Board. This Court gave full force and effect to the act of the Legislature, except in so far as it deprived Day of his vested right in his term of office. In Abbott's case, the

Railroad Commission was abolished to take effect on April 4, 1899, and the Corporation Commission was created to take effect on April 5, 1899. Both acts were ratified on the same day, to-wit, March 6, 1899. As the State's Prison in its very nature requires some executive head, whose duties would necessarily be identical with those of Superintendent, and as those duties were transferred by the same statute to an Executive Board, who would be compelled to perform those duties, either by themselves or others, these respondents saw nothing in Day's case to take it out of the operation of the rule of law laid down in *Wood v. Bellamy.* In Abbott's case it was urged by the defendant, Beddingfield, that, although the Railroad Commission was abolished and the Corporation Commission created on the same day, it was done by different acts, which were to take effect on different days, with a hiatus of one day between. It was contended that this hiatus of one day destroyed the continuity of the commission, and therefore the term of Abbott's office. Remembering that the spirit, as well as the letter of the Constitution, must be followed, and that the ultimate object of all law is to administer substantial justice, these respondents did not feel at liberty to permit a defense so purely technical to interfere with vested rights, and destroy the effect of a long and unbroken line of precedents. They had concurred with a unanimous Court in *Wood v. Bellamy* in reaffirming the doctrine that all parts of a statute are to be construed *in pari materia,* and they now followed an equally long line of decisions holding that the same doctrine applied to all acts passed at the same session of the Legislature, as well as to all parts of the same act. Omitting all cases in other States, it has been so held from the case of *State v. Bell,* 25 N. C., 506, decided in 1843, by Judges RUFFIN, DANIEL and GASTON, down to *Greene v. Owen,* 125 N. C., 212, 219. These doctrines were not only worthy of the highest respect from

their intrinsic merit, as well as the eminent ability, learning and character of the Judges who had affirmed them, but had been so long acquiesced in as to have become settled rules of law. Had these respondents ignored them in deciding *Wood v. Bellamy* in 1897, their action would have been justly condemned by the Bar and people of the State as contrary to all precedent, destructive of vested rights of property, and subversive of long-established principles of law. If those principles were the law in 1897, they were equally the law in 1899, and after these respondents had reaffirmed them in 1897, they did not feel at liberty to reverse them in 1899.

The case of *Abbott v. Beddingfield,* whose results have gone far beyond what could have possibly been contemplated in its inception, has met with the practical endorsement of a unanimous Court, as well as of the Legislative and Executive Departments of the State. In the case of *State v. Southern Railway,* 125 N. C., 666, in an opinion written by the only Justice of this Court who dissented in *Abbott v. Beddingfield,* it was decided by a unanimous Court upon the express authority of *Abbott v. Beddingfield,* that the Railroad Commission act, although ostensibly repealed, was so far a part of the Corporation Commission act as to sustain a criminal prosecution instituted under the former act. It is a well-settled rule of interpretation that all criminal statutes, and parts of statutes criminal in their effect, must be strictly construed in favor of the defendant. Therefore if in that case there had been any reasonable doubt as to the Corporation Commission act being in legal effect an amendment to the Railroad Commission act, that doubt should have been resolved in favor of the then defendant, the Southern Railway Company.

The decision in *Abbott v. Beddingfield* has also been ratified and approved by irresistible implication by the Executive and Legislative Departments of the State government,

and expressly followed by the Circuit Court of the United States, in the cases involving the increased taxation of railroad and telegraph property.

In June, 1899, the Corporation Commission issued an order assessing railroad and telegraph property in this State for taxation at the sum of $42,102,002.67, being an increase of $9,579,081.47 over the assessment for the previous year. In August, 1899, the principal railroads in the State obtained a temporary injunction from Judge SIMONTON, sitting in the Circuit Court of the United States, restraining the Corporation Commission, and all other State officers, from further assessing or collecting said increased taxes on the ground, among others, that the act creating said Corporation Commission, did not confer upon said commission any authority to assess such property or levy such taxes. A decree was entered on the 3d day of November, 1899, making said injunction perpetual on said ground alone. The opinion in *Abbott v. Beddingfield* was filed on the 21st of November, 1899, holding that, by a construction of all statutes *in pari materia* relating to such taxation, the Corporation Commission did have such powers of assessment. Immediately thereafter the attorneys for the State filed in said Circuit Court a certified copy of the said opinion, whereupon Judge SIMONTON, by a decree entered on the 10th of January, 1900, reversed his former ruling in deference to the opinion of this Court, and held that such increased assessment was within the powers of said commission, and therefore valid unless otherwise vitiated by want of uniformity. If the commission had no power to assess, their assessment was necessarily void, and could not be made the legal basis either of suit or defense.

If the decision of this Court in *Abbott v. Beddingfield* was not the law, then these increased railroad taxes were assessed and collected without warrant of law. These re-

spondents respectfully submit that they should not now be denounced as deserving impeachment for rendering a decision which is correct in principle and sustained by precedent, and which has been taken advantage of to the fullest extent by every department of the State government with the result of adding large amounts to the net revenues of the State.

This Court was composed of the same individual members without change from the 1st day of January, 1897, to the beginning of the present year. Among the office-holding cases decided during that time, up to the 127th Volume of Reports, which is not yet published, the following were decided by a unanimous Court without dissent:

Wood v. Bellamy, 120 N. C., 212.
Lusk v. Sawyer, 120 N. C., 225.
Person v. Southerland, 120 N. C., 225.
Ward v. Elizabeth City, 121 N. C., 3.
Cromartie v. Parker, 121 N. C., 198.
Harris v. Wright, 121 N. C., 172.
Shannonhouse v. Withers, 121 N. C., 376.
Holt v. Bristol, 122 N. C., 245.
Barnhill v. Thompson, 122 N. C., 493.
Cunningham v. Sprinkle, 124 N. C., 638.
Cherry v. Burns, 124 N. C., 761.
Ledford v. Greene, 125 N. C., 254.
Dowtin v. Beardsley, 126 N. C., 119.
Baker v. Hobgood, 126 N. C., 149.
White v. Murray, 126 N. C., 153.
Mitchell v. Alley, 126 N. C., 84.
Mott v. Griffith, 126 N. C., 775.
Wilson v. Neal, 126 N. C., 781.

In *Greene v. Owen,* 125 N. C., 212, and two or three other cases the Court was unanimous as to some of the parties, but not as to others. To the others, with few exceptions, but one Judge appears to have dissented. In *Caldwell v. Wilson,*

121 N. C., 425, the dissenting Judge was Chief Justice Faircloth. The political affiliations of the parties in no case had the slightest effect upon these respondents,and as a matter of fact it appears that the large majority of office-holders kept in office by the decisions concurred in by these respondents were opposed to them in politics. Such a result, arising solely from the intrinsic merits of the respective cases, is inconsistent with the charge of political bias.

These respondents again solemnly declare that, while they have decided political convictions, which they have consistently followed in private life, they have never permitted personal or political reasons to interfere in the slightest degree with their judicial opinions. They have at all times cheerfully accorded to the Legislature the respect and consideration due to it as the law-making department of the State, and have always upheld its acts when they could do so by any reasonable construction; but whenever those acts clearly appeared to be in violation of the Constitution, which it is their first and highest duty to preserve inviolate, they have said so in plain and firm, but respectful words. In concluding their answer to this article, these respondents adopt the language of Chief Justice Taylor, the first presiding officer of this Court, who, in declaring an act of the Legislature unconstitutional in *Jones v. Crittenden,* 4 N. C., 55, decided in 1814, closed his opinion with the following words: "Such "as it is, we submit it to the candor and good sense of our" "fellow citizens, who, although they may think us in error," "to which we are subject in common with the rest of the" "human family, will do us the justice to believe that such" "error is neither wilful nor agreeable. We have discharged" "what we believe to be an imperious duty to our country," "and the *mens conscia recti* forms our consolation and sup-" "port."

And the respondent David M. Furches, further answering

the said fifth article, for himself says: That as hereinbefore stated, he qualified as Associate Justice of the Supreme Court of North Carolina on the first day of January, 1895. The said Court was then composed of Chief Justice FAIRCLOTH and Associate Justices AVERY, CLARK, FURCHES and MONTGOMERY, four of whom had been elected in 1894 by the same party that controlled the Legislature of 1895. As Associate Justice of said Court, this respondent delivered the opinion of a unanimous Court in the cases of *Cook v. Meares,* 116 N. C., 582, and of *Stanford v. Ellington,* 117 N. C., 158. The effect of these decisions was to invalidate an election by the Legislature of 1895, and to retain in office a Judge and State Librarian politically opposed to the Legislature as well as to the Court. As the principles of these decisions were acquiesced in by all parties, the direct effect thereof was to stop other litigation of a similar character, and to continue in the control of an unsuccessful political party for two years longer the State Penitentiary and Department of Agriculture. It is true these cases did not depend upon the principle of *Hoke v. Henderson,* but upon principles more recent and not so well settled. This respondent cites them merely to show that his judicial conduct has never been influenced by personal or political bias, but has always been governed by his opinion of the law and his sense of duty.

And further answering all and singular the said articles of impeachment exhibited against them by the House of Representatives of North Carolina, these respondents declare that in all the matters and things therein charged and alleged against them, they acted in their judicial capacity as Justices of the Supreme Court of North Carolina, and not otherwise, seeking honestly and faithfully to discharge their official duties to the best of their knowledge and ability. They conscientiously believed it to be their solemn and imperious duty to affirm the said judgment of the Superior Court ordering

the said mandamus to be issued; and they considered themselves then, and still consider themselves, sustained in their action by the highest authorities, including many decisions of the Supreme Court of this State.

They declare that they have never violated, or intended to violate, any provision of the Constitution of this State. But on the contrary, have always endeavored to support, maintain and defend it. They have never disregarded, or intended to disregard, any valid enactment of the General Assembly of this State; but on all occasions have upheld and sustained them. They have never knowingly deviated, or intended to deviate, from the orderly course and practice of the Courts; on the contrary, they have steadily sought to follow and conform to the established rules of procedure and practice. They have never shown, or intended to show, any disrespect towards the co-ordinate departments of the State government; but, as in duty bound, have always yielded to them the rights and powers to which they are entitled. They have never wrongfully taken, or caused to be taken, directly or indirectly, for themselves or others, a dollar from the public funds; but on the contrary, so far as consistent with their official duty, they have consistently upheld the laws protecting the State Treasury. Nor have they ever in their judicial character intentionally mistreated the bench or bar of the State; but have ever accorded to both the consideration and respect to which they are entitled. They further declare that, as Justices of the Supreme Court of North Carolina, they were clothed with the power, and charged with the duty, of expounding and construing the Constitution and laws of the land. Mindful of their oaths and their high position, carefully observing, as they conceived, the limitations and restrictions thrown around the Judicial Department of the government, striving amidst the turmoil and excitement of the times to discharge their official duty without fear or

favor, they have endeavored faithfully and conscientiously to perform the grave and delicate tasks entrusted to them. If the manner in which they have observed this responsibility has not received the approbation of all of their fellow citizens, they can only regret their inability to meet the requirements of such an ideal standard.

Whatever may be the criticisms or opinions of others, disclaiming every wrongful motive or intention whatever, repelling every imputation upon their official integrity, asserting that in all things they have done in the premises they were actuated by the purest sense of what they deemed a high official duty, and confidently believing that in every step they were warranted and supported by the Constitution and laws of the land, these respondents, for plea to all and singular of the said articles of impeachment, solemnly declare, each for himself, that he is not guilty of any crime or misdemeanor, as in and by the said articles is alleged; and appealing to the justice, the wisdom and the honor of their country, firm in conscious integrity, they confidently submit their official conduct and behavior to the impartial judgment of their fellow men.

DAVID M. FURCHES.
ROBERT M. DOUGLAS.

THOS. J. JARVIS,
F. I. OSBORNE,
F. H. BUSBEE,
C. M. COOKE,
WM. P. BYNUM, Jr.
B. F. LONG,
LINDSAY PATTERSON,
Counsel.

Senator LONDON: "I desire to offer the following resolution:

"'*Resolved,* That the answer of the respondents be received and filed, and that a copy be furnished to the House of Representatives and Board of Managers, and that two hundred copies be printed for the use of the Court.'"

This motion is carried, and it is so ordered.

Senator HENDERSON: "I move that the Court of Impeachment take a recess until Friday next at 12 m., to receive the replication of the Board of Managers."

The motion is carried, and the Sergeant-at-Arms is ordered to make proclamation of adjournment.

THIRD DAY.

THE SENATE CHAMBER,
Friday, March 8, 1901.

The Court of Impeachment meets at 12 o'clock m., pursuant to adjournment, Lieutenant-Governor Turner, President of the Senate, in the chair. The proceedings are opened by proclamation made in due form by the Door-keeper.

The managers, on the part of the House and their counsel, appear and are given seats on the left, and counsel for defendants are seated on the right.

The roll of Senators is called and the following answer to their names:

Messrs. Alexander, Arrington, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Morrison, Morton, Pinnix, Robeson, Scott, Stikeleather, Stringfield, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

Mr. Manager ALLEN says:

"Mr. President: The House of Representatives has adopted a replication to answer filed, which we ask to have read and filed."

The replication is read by the Clerk as follows:

REPLICATION.

REPLICATION by the House of Representatives of the State of North Carolina to the joint and several answer of David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice, of the Supreme Court of North Carolina, to the Articles of Impeachment exhibited against them by the House of Representatives:

The House of Representatives of the State of North Carolina have considered the joint and several answer of the said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice, of the Supreme Court of North Carolina, to the several Articles of Impeachment against them by the said House of Representatives, exhibited in the name of themselves and of all the people of the State of North Carolina, and reserving to themselves all advantage of exception to the many evasions, irrelevances, the argumentativeness and the insufficiency of said answer to each and all of the several Articles of Impeachment exhibited against said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice, of the Supreme Court of North Carolina, do deny each and every averment in said joint and several answer, or any or either of them, which denies or traverses the acts, intents, crimes or misdemeanors charged against said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas, an Associate Justice, of the Supreme Court of North Carolina, in said Articles of Impeachment, or either of them; and for replication to said joint and several answer do say that the said David M. Furches, now Chief Justice, and formerly an Associate Justice, and Robert M. Douglas,

an Associate Justice, of the Supreme Court of North Carolina, are guilty of the high crimes and misdemeanors mentioned in said articles, and that the House of Representatives are ready to prove the same.

This is to certify that the foregoing is a true copy of the resolution and replication adopted by the House of Representatives of North Carolina, on this the 8th day of March, 1901.

WALTER E. MOORE,
Speaker House of Representatives.
BREVARD NIXON,
Clerk.

Senator LONDON offers the following resolution:

"*Resolved,* That the replication of the House of Representatives be received and filed, and that the Clerk furnish a copy thereof to the counsel of the respondents, and that two hundred copies be printed for the use of the Court."

The resolution is adopted.

Senator WOOD suggests that it ought to be definitely determined when this Senate can hear the trial, as the counsel ought to know.

Mr. ALLEN, in behalf of the Managers, states that they will ask for no further time.

Senator WEBB moves that the Court adjourn until Monday at 12 o'clock.

Mr. ALLEN states that the Managers do not desire to confer any longer, and that the motion made by the Senator from Cleveland is satisfactory.

The motion of Senator Webb is adopted and the Court adjourns.

FOURTH DAY.

THE SENATE CHAMBER,
March 11, 1901.

The Court of Impeachment is called to order by the President of the Senate.

The Sergeant-at-Arms makes due announcement that the Court had convened.

The arrival of the managers and their counsel and the respondents and their counsel is duly announced and they are invited to seats.

The roll is called and the following Senators respond:

Messrs. Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Foushee, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

Sneator WOODARD: "I am sure that every member of this Senate now sitting as a Court of Impeachment is impressed with the solemnity of the duty imposed upon them by the House of Representatives. I am sure that each member of this Court desires to give patient and painstaking and thoughtful consideration to every argument and to all the evidence produced. We have now some important legislative duties to perform, which would conflict with our duties when sitting as a Court of Impeachment, and because I think it is the desire of every member here to give his entire attention to the trial of these Judges, I move that this Court do now adjourn until Thursday, the 14th of March, at 12 o'clock."

Senator JUSTICE: "I should be glad to hear the wishes of counsel upon both sides, as to this question, to ascertain what they desire about it before I cast my vote."

Mr. Manager ALLEN: "I will state, in behalf of the Managers and their counsel, that any course the Senate sees fit to take in regard to the matter will be entirely satisfactory to us. We are entirely willing to abide by the decision of the Senate upon the question."

Mr. JARVIS: "From the time these charges were preferred until now the respondents have determined to facilitate this trial in every way in their power. We are here prepared to go forward, so far as the respondents are concerned. We appreciate the fact that other duties devolve upon the Senate, but that is a question entirely with the Senate. We have no suggestions to make, but will conform our wishes entirely with theirs."

Senator TRAVIS: "The Senate now has under consideration very important questions. For myself, I do not wish my mind diverted from this trial, and when I go into it I do not want my mind diverted by anything else of importance, and I think it best to finish all legislative duties so that we can give our entire time to it."

Senator JUSTICE: "Whatever course the Senate takes about that, whether they postpone the trial until Thursday, or go into it now, this Court must be sworn after issue joined. So that the Senate might as well postpone the motion until after we ascertain if the cause is at issue; the court must be again sworn, as I understand it, after issue joined. I will be glad if the gentleman will postpone his motion until we ascertain if the case is at issue upon the Articles of Impeachment and the answer thereto and the replication of the managers."

Senator WOODARD: "My purpose in making the motion was, that there might be a time within which the legislative duties might come to a head. I can see no harm in the

suggestion made by the gentleman from Rutherford, and I am willing to defer to the gentleman as to whether issue has been joined."

Senator FOUSHEE: "I would like to suggest to the Senator from Wilson, that the best information I can get is, that the House will not be through its business until Saturday, and if we are to put off the matter until we are through with other business we had better put it off until Monday. My idea is, that we can not get through the Legislative work until Saturday, and before we vote, I move we had best consider that. If we are to adopt his idea we had best adjourn until Monday. As to whether we had best go on at two and a half hours or three hours a day, or wait until Monday, is the question before us."

Mr. PRESIDENT: "Under the suggestion of the gentleman from Rutherford, I would like for the counsel for the Managers and for the respondents to indicate whether they desire to file further pleadings in the matter."

Mr. Manager ALLEN: "We have no additional pleadings to file, as we now regard the question at issue."

Senator HENDERSON: "One thing possibly ought to be considered in this matter: Witnesses have probably been summoned to be here to-day to be examined, and, I suppose, they will be here, and the question is, what ought to be done with them if the hearing is adjourned. What disposition should be made of these witnesses?"

Mr. JARVIS: "I will state that relying upon the announcement that the case would be taken up and proceeded with to-day, we have had a number of witnesses summoned to be here to-morrow. Some can be stopped; others can not; still I leave the question to the Senate as to what they desire to do as to the trial. I will state, however, that all the pleadings are filed on our part."

Senator WARD: "I certainly think we should dispose of

public business before going into this trial. It is impossible to mix up this matter with our business. It has been said, with no suggestion to the contrary by gentlemen supposed to know, that it will be as late as Saturday before the public business can be disposed of. The delay of the witnesses can be of no importance. The bill we passed provides for them until they are sworn and examined. They are all right. I take it that this Senate must certainly want to take up one thing at a time, and the public business is of the first importance. I regard it as impossible to mix the two duties; therefore, I offer to amend the motion of the gentleman from Wilson by making it Monday (one week from to-day) at 12 o'clock, instead of Thursday."

Senator LONDON: "I thought the gentleman from Wilson had withdrawn his motion. I desire to object to the motion. The counsel for the Managers are here and the counsel for the respondents are here, the witnesses are here, or upon the way (they were summoned to be here to-day), and I can see no reason why this Court should not proceed in a proper manner in the discharge of its duties. The Senate Calendar is almost completed and we can keep up with the House by working at night. I am willing to work day and night to keep up. That course was pursued in the celebrated impeachment trial of Governor Holden, and no one complained that their duties as Senators and jurors conflicted. I hope that the motion to postpone will be voted down and that we will proceed to-day with the trial. If necessary, hold afternoon and night sessions of the Senate."

Senator MORRISON: "I want to say there is some doubt about when the House will get through with its labors. I have just been told by one of the most prominent members of that body that they would get through by Thursday. I was inclined to agree with Mr. London. If we adjourn at all, it ought not to be to a later date than Thursday."

The PRESIDENT: "All in favor of the amendment of the gentleman from Washington will rise."

The motion does not receive a second.

The PRESIDENT: "As many as favor the motion of the gentleman from Wilson will rise and be counted. The motion is to adjourn until Thursday at 12 o'clock."

Senator JUSTICE: "As I understand the gentleman from Wilson, who is now in a Court of Impeachment, the regular and orderly thing to do is to administer the oath, as required under the law."

The PRESIDENT: "I am of the opinion that the Senators should be sworn after the issue is made up and that now is the time for swearing the Senators."

Senator HENDERSON: "Why is it we are to be sworn twice?"

The PRESIDENT: "The statute provides that they shall be sworn on the organization of the Court, and after the issue is made up, and I hold that they should be sworn again."

The following Senators thereupon appeared at the bar of the Senate and were administered the following oath by the President of the Senate:

Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Foushee, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall (who affirms), McIntosh, McAllister, McIntyre, Michael, Miller, of Caldwell; Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

OATH.

"I swear truly and impartially to try and determine the charges in the Articles of Impeachment exhibited against David M. Furches, Chief Justice of the Supreme Court of

North Carolina, and Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, under the Constitution and laws thereof according to the evidence. So help me God."

Senator JUSTICE: "I take it for granted that the gentleman from Wilson will now renew his motion. I want to say that if the counsel desire to go on, or if the counsel for the respondents say they desire to go on, I am prepared to vote against any proposition to postpone. I think the respondents are entitled to a speedy trial, and while Monday would be a speedy trial, I am content, so far as I am concerned, if the gentlemen have any preference about it, to be guided by their wishes."

Senator HENDERSON: "I wish to say for myself, that if both sides will agree to postpone, it will be more agreeable to me. If the trial is to proceed, I think it will be best for the Senate to change its rules and have but one sitting a day until the Legislative work is disposed of. Unless counsel think otherwise, it seems to me best for the trial to proceed."

Senator WOODARD: "I made the motion after talking with counsel on both sides. They thought it best to abide the decision of the Senate. I am in earnest when I say I think it the most solemn duty that can be imposed upon us, and I think it is the opinion of the majority of the Senators on this floor that this work should not be interfered with by our Legislative duties. The importance of this matter should receive all of our attention, and it will be more convenient to enter on the trial after all the Legislative work shall have been finished. After talking with some of the leading members of the House, I am informed that their work will be finished Thursday, and that the latter part of the day will be devoted to the ratification of bills. It was with that assurance I made the motion."

Senator LONDON: "The counsel for the respondents have announced their readiness for trial, and I do not see why we should not proceed now; our calendar is cleared up. We can meet at 9 and work to 11; meet at 4 and work to 6 o'clock, and meet at 8 and work to 11 o'clock. We have to do this work, and I do not think it will interfere with the Legislative business. I think, in justice to the parties, we ought to proceed."

Senator WOODARD: "I renew my motion."

Senator TRAVIS: "Mr. President—"

The PRESIDENT: "The rules require the motion to be put without debate."

Senator WOODARD: "I interpose no objection."

Senator TRAVIS: "I want to say, that so far as I am concerned, I have some matters of general legislation upon my mind now that I want to get rid of before going into anything else. We have the appropriations to make for all the State institutions, and we have the question before us of obtaining sufficient revenue to meet these appropriations. This question requires grave consideration. We have also under consideration our election law. We do not desire to hasten over that. It is necessary to hold caucuses night and day over that. We can not do that and hold sessions at night, but I think if we can get two or three nights we can carry on the trial and the Legislative duties at the same time. We can not do both justice now. All these questions ought to receive careful consideration."

Mr. BUSBEE: "The respondents and their counsel mean frankly just what they say—that the public business and the convenience of the Senate should be considered. The public business has precedence, and all are willing that the Senate may take that course which, in its opinion, is best for the public business. We are frank in saying that the Senate may take that course which, to them, may seem best, and we will conform to their wishes."

Mr. Manager ROUNTREE: "I am glad to hear the announcement of Mr. Busbee. The fact of the matter is, that the press of public business upon the Managers themselves has been so great they have not been able to give that immediate attention to this matter they otherwise would. If entirely agreeable, it would be more satisfactory to us if the Senate would grant this indulgence until Thursday. While we are ready to go on we prefer that this matter shall go over until Thursday."

The PRESIDENT: "As many Senators as favor the motion of the gentleman from Wilson will rise and be counted. A sufficient number is up. The Clerk will call the roll."

The Clerk calls the roll and the following Senators vote in the affirmative:

Senators Alexander, Arrington, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Glenn, Gudger, Henderson, Justice, Long, Marshall, McIntosh, Michael, Miller, of Caldwell; Miller, of Pamlico; Morton, Robeson, Scott, Speight, Stikeleather, Stringfield, Thomas, Travis, Ward, Warren, Webb, Wood and Woodard. Thirty-one ayes.

The following Senators vote in the negative:

Senators Aycock, Bray, Broughton, Foushee, James, Leak, Lindsay, London, McAllister, McIntyre, Morrison, Pinnix, Sugg, Vann. Noes, fifteen.

The motion is adopted, and it is so ordered.

Mr. Manager ROUNTREE: "It has been suggested to me that the record of the Court should show that the Senators were sworn after the issue was joined."

The PRESIDENT: "We have a stenographer present, and I presume it will so appear from the record."

The Sergeant-at-Arms thereupon makes due announcement of the adjournment of the Court of Impeachment until Thursday at 12 o'clock.

FIFTH DAY.

Thursday, March 14, 1901.

Pursuant to adjournment, the Court of Impeachment is called to order at 12 m. by the President, and proclamation thereof is duly made by the Sergeant-at-Arms.

The Clerk calls the roll and the following Senators are present:

Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood, Woodard. Fifty.

Senators Burroughs, Foy and McNeill appear before the bar of the Senate and are administered the oath prescribed for members of the Court, by the President.

The PRESIDENT thereupon announces that the Court is ready to proceed to business.

Mr. Manager ALLEN thereupon addresses the Court as follows:

"Mr. PRESIDENT:—The duty devolves upon me, as chairman of the Board of Managers, of presenting to this Court the views of the House of Representatives upon the pending Articles of Impeachment. We shall ask the calm, deliberate consideration of each member of the Court, and shall demand that he pronounce the verdict which his judgment and his conscience dictate. There have been strong influences at work to divert the mind of members of the General Assembly from the real issue, and to impress upon them and the people that there is no serious question here to be decided. We have been told that the people of the State do not ap-

prove this prosecution. If this were true, the obligation would be none the less upon you to decide this case upon the law and the evidence, as you sit as sworn triers, and can not be swayed by public clamor for or against the respondents. But we believe that it is not true that the people do not approve this prosecution, and that the suggestion can in every instance be traced to those who are personally interested in the defence. If such considerations could enter the minds of Senators we would point to the action of the House of Representatives as expressive of the will of the people. We have been elected by the people, are responsive to their wishes, are responsible to them for our conduct, and are acting under the obligations of an oath to protect and preserve their rights. Can we not then claim to prosecute in this matter, in fact, as well as in theory, in the name of and for all the people of North Carolina?

"Again, it is claimed that this prosecution is partisan, and that the purpose is political. We would ask Senators to bear in mind that the purpose of all impeachments is in one sense political, in that it is an effort to purge the public service, and that the instance will be rare indeed in which it is not exercised by a political party opposed to the political views of those whose conduct is being inquired into. This is true, because those of the same political faith are in sympathy with each other, and they will not take the odium of exhibiting to the public, the misconduct of officials for whose election they are responsible. If it is intended, however, to say that this prosecution is partisan, in the sense that it is an effort to get rid of officers of a different political party, simply because there is a difference in political views, the charge is without foundation, and the course that this prosecution has taken disproves it. When the first resolution was introduced in the House of Representatives, it was at once referred to the Judiciary Committee of the House. At a

meeting of the committee on the same day, the resolution was, without debate, referred to a sub-committee of five, consisting of Judge Graham, Judge Connor, Mr. Craig, Mr. Spainhour and myself. At the first meeting of this sub-committee it was unanimously agreed that we would first undertake to ascertain the facts before we discussed any conclusions, or any recommendations that we would make. We examined all witnesses that were obtainable, who were thought to know anything of the facts, and after this examination we discussed the evidence and agreed upon the facts that we would find. We then began the consideration of the inferences and conclusions that we would draw from these facts. After unanimously agreeing upon a report to the effect that the respondents were guilty of conduct which made them liable to impeachment, we refused to recommend to the full committee the course that the committee should take upon the resolution of impeachment, feeling that the full committee should be free to take such action as it thought best, and that it should not be in the situation of having to reject our recommendation or to adopt the resolution. The report of this sub-committee was considered by the Judiciary Committee at three meetings. It was discussed fully, calmly and deliberately, and in the course of the discussion there was manifested no spirit except that of arriving at the truth. There were no impassioned speeches, and there was no effort to influence any member on account of any political consideration. The committee reported the resolution to the House, and it was there considered for four days, full opportunity for debate being given to all. We point to these facts as evidence that the charge is false that any consideration has influenced the House except that of the public good. There were Republicans upon the committee, who participated in its deliberations.

"Again it has been said that this is a small matter, that

only the sum of $831 is involved, and that this does not justify the organization of a Court of Impeachment. The amount is not large, but I hope to show that the principle involved is vital, and that it is one placed in the Constitution by the people for the preservation of their liberties, and upon which, perhaps, more depends than upon any other in the Constitution. The amount involved, however, is important, for all know that if Judges can compel the payment of $831 out of the Treasury contrary to the Legislative will, they can compel the payment of any amount claimed by any pretended creditor of the State. It seems that this is fully appreciated elsewhere, as the holders of claims against the State, long since repudiated, are renewing their demands upon the Treasurer and the Legislature.

"I have said this much because of matters that have come under the observation of all, and I now proceed to a discussion of the Articles of Impeachment—the facts we expect to prove, and our views of the law.

"It may be well here to determine the origin and purposes of a Court of Impeachment, because, if we see clearly how this Court originated, and why it is formed, we will have a clearer conception of the duties to be performed. Foster, in his work on the Constitution, sec. 87, says that 'impeachment trials are a survival of the earliest times of jurisprudence, when all cases were tried before an assembly of the citizens of the tribe or State. Later, ordinary cases, both civil and criminal, were assigned to courts created for that purpose, but matters of great public importance were still reserved for a decision of the whole body of citizens, or subsequently, of the council of elders, heads of families, or holders of fiefs. This was due partly, because in cases of this character there was danger of undue influence in the decisions of ordinary courts, and of resistance to the execution of their decrees, and partly because they affected public as well as private interests.' In the earlier times, when the

population was not large, and when trade and business were in their infancy, when the affairs of human life had not become complicated and intricate, the people reserved to themselves the decisions of many questions in their popular assemblages; but as population and trade increased they began to distribute to different officers the right to decide these questions. This continued until practically all judicial power had been distributed to the different courts, and the people reserved to themselves the one power of supervising the conduct of the officials that they themselves had created and appointed. As population continued to increase, it became impracticable to exercise this power in popular assemblages, and so they reposed it in those, who are the direct representatives of the people, and it is in this capacity that this Court sits to-day to inquire into the official conduct of the respondents. Its purpose is to inquire into official conduct, and is in the nature of an inquest of office. Foster says, in section 89: 'What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of national inquest into the conduct of public men?' If, then, the people have reserved to themselves the right to inquire into the conduct of their officials, and if the purpose of a Court of Impeachment is to carry into effect this right, we may expect the powers of the Court to be broad, strong and elastic, so that all official conduct may be investigated and the public service purified. The people of the State knew of the importance of this power, and in framing their Constitution provided in the Constitution for a Court of Impeachment, in order that the right might never be taken from them except by their consent, and they were wise in not attempting to define the powers of the Court in the Constitution, in order that no official misconduct might escape its just punishment. The Constitution, Article IV, section 2, simply provides, 'the judicial power of the State shall be vested in a court for the trial of impeachments (a Supreme

Court, etc.).' Section 3, 'The Court for the trial of impeachment shall be the Senate.' Section 4, 'The House of Representatives solely shall have the power of impeaching.'

"It was not by inadvertence that the Constitution is not more specific in regard to the powers and duties of the Court of Impeachment. Judge Cooley, in an article written for the Encyclopœdia Brittanica, in speaking of the provisions of the Constitution of the United States, which is in this respect similar to ours, says: 'But the constitutional provision was necessarily left vague and very much at large in view of the absolute impossibility of specifying by enumeration or description in advance the infinite variety of ways in which public officers may so conduct themselves as to render their further continuance in office a public scandal or a public danger.' It was intended then, that the Court should have jurisdiction of all official misconduct, and all such is denominated in the law of impeachment as 'high crimes and misdemeanors in office.'

"Foster says, in section 89, 'The subjects of its jurisdiction are those offences which proceed from the misconduct of public men; or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated 'political,' as they relate chiefly to injuries done immediately to the society itself.'

"Black, on Constitutional Law, on page 112, says: 'But the phrase, 'for high crimes and misdemeanors,' is so very indefinite that practically it is not susceptible of exact definition or limitation. But the power of impeachment may be brought to bear on any offence against the Constitution or the laws which, in the judgment of the House, is deserving of punishment by this means, or is of such a character as to render the party accused unfit to hold and exercise his office. It is, of course, primarily directed against official misconduct.'

"Tucker, on the Constitution, says: 'The process of impeachment is a *political* proceeding against the accused as an officer of the government to protect the government from the present or future encumbency of a man whose conduct has proved him unworthy to fill it.' In the great impeachment trial of Andrew Johnson, the rule adopted by the managers on the part of the House of Representatives, and practically undisputed by the respondent, is substantially to the same effect. It is stated in Volume 1, page 147, of that trial as follows: 'The result is that an impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or without volating a positive law, by the abuse of discretionary powers from improper motives or for improper purposes.'

"I request the attention of the Court particularly to this statement of the law, and remind you that the question of improper motive does not, under this rule, enter into the consideration of the Court, except where they are investigating an abuse of discretionary powers. The statement is, that a high crime or misdemeanor in office may consist of the violatoin of the Constitution; that it may consist of a violation of law; that it may consist of the violation of an official oath, or that it may consist of the violation of duty by an act committed or omitted. And again, that without violating any positive law, it may consist of an abuse of discretionary powers from improper motives or for an improper purpose. Our statute upon the subject of impeachment, 2937 of The Code, follows the spirit of the Constitution, and while there are some acts stated in the statute which are said to be impeachable, there are general terms which cover all official misconduct. It says: 'Every officer in this State

shall be liable to impeachment for, first, corruption or other misconduct in his official capacity.' It follows then, that under the general law, and under our statute, that all misconduct by a public officer is impeachable. Having discussed what is an impeachable offence, the answer of the respondents renders it necessary to discuss who is impeachable, and for the purposes of this case, the question may be discussed with reference to the respondent, David M. Furches. It seems to be suggested in the answer that he is not impeachable because at the time of the alleged misconduct he was an Associate Justice of the Supreme Court and that now he is Chief Justice of the Supreme Court. We submit that both authority and reason will compel the repudiation of this defence. The purpose of impeachment is to remove an officer whose conduct is a menace to the public interest, and it would be strange indeed if he could escape punishment by being elevated to a higher official position. If such a defence could be sustained, one could by resignation avoid an investigation into his conduct by a Court of Impeachment, and if he was of the same political faith as the head of the Executive Department, and in sympathy with it, he could be transferred from one office to another, and thus avoid impeachment. The effect of such defence would be to practically destroy the power of impeachment, and at any rate it would be greatly impaired. We believe that the authorities are practically unanimous in sustaining our contention, that the change of office does not effect th epower of impeachment. He is now exercising the same powers that he exercised when he was an Associate Justice. He is performing the same duties; he is practically filling the same office.

"Foster, on the Constitution, page 575, says: 'The power of impeachment is granted for the public protection, in order to not only remove, but perpetually disqualify for office a person who has shown himself dangerous to the Commonwealth

by his official acts. The object of this salutary constitutional provision would be defeated, could a person by his resignation from office obtain immunity from impeachment.' And again, on page 579, 'State Senates have sustained Articles of Impeachment for offences committed at previous and immediately preceding terms of the same or a similar office.'

"In *State v. Hill,* 37 Neb., page 88, it is said: 'Judge Barnard was impeached in the State of New York during his second term for acts committed in his previous term of office. His plea that he was not liable to impeachment for offences occuring in the first term was overruled. Precisely the same question was raised in the impeachment proceeding against Judge Hubbell, of Wisconsin, and on the trial of Governor Butler, of this State, in each of which the ruling was the same as in the Barnard case. There was good reason for overruling the plea to the jurisdiction in the three cases just mentioned. Each respondent was a civil officer at the time he was impeached, and had been such uninterruptedly since the alleged misdemeanors in office were committed. The fact that the offences occurred in the previous term was immaterial. The object of impeachment is to remove a corrupt or unworthy officer. If his term has expired, and he is no longer in office, that object is attained, and the reason for his impeachment no longer exists. But if the offender is still an officer, he is amenable to imnpeachment, although the acts charged were committed in the previous term of the same office.'

"The ruling of the Senate of the United States upon the impeachment of Wm. K. Belknap also furnishes a precedent for our contention. Prior to the adoption of the Articles of Impeachment against Belknap he tendered his resignation to the President and it was accepted, and upon his trial he interposed a plea to the jurisdiction on the ground that he had ceased to be an officer and was not liable to impeachment, and this plea was overruled by the Senate.

"We have then four precedents, one by the Senate of the United States, one by the Senate of New York, one by the Senate of Wisconsin, and another by the Court of Impeachment of Nebraska, endorsed by the Supreme Court of Nebraska, and by Foster in his Work on the Constitution. May we not then confidently assert that David M. Furches is impeachable, and that he stands in this case upon the same footing, and that his conduct is to be judged in the same way as that of the other respondent, Robert M. Douglas.

"Let us see then, what has been the conduct of these two respondents, and whether they are guilty of any conduct which justifies their impeachment. The Managers charge and expect to prove that they have been guilty of four distinct violations of law:

"First. That contrary to the provisions of section 9, Article IV of the Constitution, which says: 'The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; *no process in the nature of an execution shall issue thereon;*" that they have compelled process in the nature of execution to issue against the State, in that they compelled the Clerk of the Supreme Court to issue a mandamus against the Treasurer of the State to compel the payment of money from the Treasury.

"Second. That they have violated the provisions of Article XIV, section 3, of the Constitution, 'that no money shall be withdrawn from the Treasury, but in consequence of appropriations made by law,' by compelling mandamus to issue against the Treasury when there was no appropriation permitting payment.

"Third. That they have violated the provisions of section 9, of chapter 19, of the Laws of 1899, which provides that compensation to employes of the Shell-Fish Commission shall be paid upon the warrant of the Auditor, 'which warrant

shall be issued by the Auditor upon the certificate of the Secretary of the said Board (Shell-Fish Board), and countersigned by the chairman of the Board of Shell-Fish Commissioners,' in that they issued a mandamus compelling the Auditor to issue his warrant, when no certificate of the Secretary of the State Board, countersigned by the chairman of the Board, had been executed.

"Fourth. That they violated the provisions of chapter 21 of the Laws of 1899, which provides, 'That the Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the Shell-Fish Industry, unless such person or persons are authorized to render such service under the provisions of said Act, entitled to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina and ratified March 2, 1899,' which Act was chapter 19 of the Laws of 1899, by compelling a mandamus to issue against the Treasurer requiring him to pay compensation to persons not authorized to render services under chapter 19 of the Laws of 1899.

"Fifth. That in a series of acts and conduct, extending over a period of about two years, that they have diregarded the will of the Legislature and have undertaken to impair or destroy its power.

"The facts briefly stated are these: In 1897 the Lgeislature passed an act known as chapter 13. Under section 12 of that act, Theophilus White was appointed Chief Inspector of the Shell-Fish Industry for a term of four years. Section 13 of that act provided for his compensation. Section 14 of the act provided, 'that all moneys in excess of $500, derived through the provisions of this act and in the hands of the State Treasurer, on the last day of November in each year, shall be transferred by him to the public school funds of the State.' In 1899 the Legislature passed an act known as chapter 18 of the Laws of 1899. By this act, section 12 of

the Laws of 1897, creating the office to which Theophilus White had been appointed, was repealed, and section 13, profor his compensation, was also repealed; but section 14, providing that on the last day of Novmber of each year all moneys in the oyster fund in excess of $500 should be turned into the school fund, was left in force.

"The Legislature of 1899 passed two other acts relating to the Shell-Fish-Industry—one known as chapter 19, and the other known as chapter 21. Chapter 19 undertook to provide for the general supervision of the Shell-Fish Industry, and in section 1 appointed seven commissioners to carry out the provisions of the act, and named those commissioners in section 2 of the act, the first one of them being George H. Hill. That in section 9 of chapter 19, it was provided, 'that the compensation of employes should be paid upon the warrant of the Auditor, which warrant shall be issued by the Auditor upon the certificate of the Secretary of the said Board, and countersigned by the chairman of the Board of Shell-Fish Commissioners.'

"That chapter 21 provided 'that the Treasurer of the State shall not pay any compensation to any person or persons claiming the same for services rendered the Shell-Fish Industry, unless such person or persons are authorized to render such service under the provisions of said act, to-wit, Chapter 19 of the Laws of 1899.' That after the ratification of the Acts of 1899, the commissioners named in chapter 19 qualified and entered upon the discharge of their duties. That thereafter, Theophilus White instituted an action against these commissioners to recover the office, alleging that he was entitled to the office under the Act of 1897, and that they were exercising the same office to which he was entitled under the Act of 1897. This case went by appeal to the Supreme Court of North Carolina, and was decided in favor of White. Thereafter a controversy without action against the Treasurer and Auditor of the State was submitted in the county

of Perquimans to compel the Auditor to issue his warrant for his compensation, and to compel the Treasurer to pay the same. This case also came to the Supreme Court by appeal, and the opinion was filed on the 22d of May, 1900, adjudging that White was entitled to enforce payment of his compensation. No writ was, however, issued at that time, and the Legislature of 1899, at its adjourned session in June, sharply called the attention of the Treasurer of its purpose to control the disbursement of the public money by a resolution of inquiry, asking if the claim of White had been paid. This resolution was in the nature of a notice. The counsel of White importuned the Clerk of the Supreme Court to issue the writ, but he refused to do so, and the respondents more than once told the Clerk that he ought to issue the writ, but would not make an order that he do so. At the September Term of the Supreme Court, 1900, an application was made in open Court for the writ of mandamus. The Court then asked if notice had been given to the opposite party, and upon being told that no notice had been given, declined to entertain the motion. But a few days thereafter an application was again made, the notice of the motion having been waived, and counsel making the application was then asked if he had filed any affidavits, and upon his statement that he had not done so, the Court again refused to entertain the application. That while these applications were being refused in open Court, the respondents were saying privately to the Clerk that he ought to issue the writ. Two members of the Court—Judge Clark and Judge Montgomery—told the Clerk that he had no power to issue the writ, and in consequence of this the Clerk refused to issue it without the express direction of the Court. That he twice applied to the Court while in conference for directions. The first time he made his application the respondents expressed their individual opinions as to his duties, but did not make any order that he issue the writ.

But the second time, upon being pressed by the Clerk for specific directions, directed him to issue it. That Judge Clark, a member of said Court, thereupon demanded a right to file an opinion, giving his reasons for dissenting from the action of the Court, and the respondents refused to permit him to exercise his right. He then asked permission to file his protest, which was refused. That a copy of this opinion which Judge Clark asked to be filed had been sent to the respondents prior to the time that they directed the Clerk to issue the writ, and in this opinion the attention of the respondents was sharply called to the provisions of the Constitution and the Statutes, which they are charged with violating.

"The answer to the charges made is in many respects a wonderful document. It combines the ability of learned lawyers, the skill of statesmen, and the craft of the politician. It is an answer, and at the same time a speech. It has in it many expressions appealing to the generosity of the people, and others intended to touch their sympathies. The first defence raised by it, is a denial that they have violated Article IV, scetion 9, of the Constitution, because they say that the claim of Theophilus White against the Treasurer was not a claim against the State. The State, like private corporations, has to act through its agents and its officers, and it is through them alone that the State can be reached, and I think that the authorities are unanimous that an action instituted against an officer of the State in regard to his official conduct, compelling him to do, or refrain from doing, some particular act, is an action against the State.

"The writ of mandamus is not a remedy usually resorted to, and as is said by McRae, Judge, in *Board of Education v. The State Board of Education,* 114 N. C., page 320, 'will never be issued, except where its propriety is plain and beyond doubt.'

"In the case of *Cunningham v. Macon,* 109 U. S., page 454, the Court says: 'The objections to proceeding against State officers by mandamus or injunction are, first, that it is in effect proceeding against the State itself; and second, that it interferes with the official discretion vested in the officers. It is conceded that neither of these can be done.' And again, on page 455, 'The short statement for the reason of this judgment is, that as a State could not be sued or made a party to such proceeding, there was no jurisdiction in the Circuit Court either by mandamus at law, or by a decree in chancery to take charge of the Treasury of the State, and seizing the hands of the Auditor and Treasurer to make distribution of the funds found in the Treasury in the manner in which the Court might think best.' And again, on page 456, 'The Treasurer of the State is a keeper of the money collected from this tax just as he is keeper of other public moneys. Taxes were collected by the tax-collectors and paid over to him, that is to say, into the State Treasury, just as other taxes when collected. He is no more a trustee of these moneys than he is of all other public moneys. He holds them only as agent of the State. If there is any trust the State is the trustee, and unless the State can be sued the trustee can not be enjoined. The officers owe duty to the State alone, and have no direct relations to the bondholders. They can only act as the State directs them to act, and hold as the State allows them to hold. It was never agreed that their relation to the bondholders should be other than as officers of the State, or that they could have any control over this fund, except to keep it like other funds in the Treasury, and to pay it out according to law. They can be moved through the State, but not the State through them.'

"Again, in *Hagood v. Southern,* 117 U. S., page 69, the Court says: 'If this case is not within the class of those forbidden by the Constitutional guarantee to the States of im-

munity from suits in Federal tribunals, it is difficult to conceive the frame of on ewhich would be. If the State is named as a defendant it can only be reached either by mesne or final process through its officers and agents, and a judgment against it could neither be obtained nor enforced, except as the public conduct and government of the ideal political body called the State could be reached and affected through its official representatives. A judgment against this latter in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the courts, is, if anything can be, a judicial proceeding against the State itself; if not, it may well be asked what would constitute such a proceeding? We confidently assert that the proceeding against the Treasurer to compel payment from the Treasury is a proceeding against the State, in violation of Article IV, section 9.

"Again, the Judges deny that the issuing of the writ of mandamus is in violation of Article XIV, section 3 of the Constitution, because, they say, the writ was issued in consequence of an appropriation made by law. That is, that under the Acts of '97 and '99 there was a fund set apart, out of which the claim of White could be paid, and that they were directing the writ to issue in accordance with the legislative will and not in opposition to it. Attention has been called to the fact that section 14 of the Act of 1897, requiring all of the oyster fund in excess of $500 to be turned into the school fund on the last of November of each year, was not repealed by any act of 1899, and that it is still in force. The examination of the facts in the action of *White v. the Auditor* discloses that the action was heard on December 4, 1900, and for services alleged to have been rendered from March 15 to November 20. By the very terms of the act under which he was claiming to hold his office there could not have been more than $500 in the Treasury, and this was a fact known to the Court. If there was an admission to the con-

trary it must have been known to be fraudulent and collusive. If it be admitted that there was an appropriation of the fund to pay the salary in the act when the application for the mandamus was made, still the respondents compelled the payment of nearly twice the amount in the Treasury. But if we admit that the Acts of 1897 and 1899 made an express appropriation for the payment of the claim held by White, chapter 21 of the Laws of 1899 forbade the payment of any sum by the Treasurer on account of services rendered to the Shell-Fish Industry, except such persons as were authorized to act under chapter 19 of the Laws of 1899, who were Hill and the other commissioners named in that act, and not White. I think it can not be doubted that the same power which can make an appropriation can withdraw it, and that although the Legislature may have provided for the payment of this claim, that when it said that the claim could not be paid it was not within the power of any court to compel payment. I refer the Court to the case of *Wilson v. Jenkins,* 72 N. C., page 5. That was an application for a mandamus similar to the application made by White against the Treasurer. It appears in the case that in 1868 the General Assembly passed an act providing for the payment of the interest of the lawful debt of the State, and that in 1874 the General Assembly passed another act repealing the Act of 1868, and provided that the Treasurer shall not pay or discharge any claim for interest upon any portion of the bonded indebtedness of the State. The plaintiff in that action claimed that the State having provided for the payment under the Act of 1868 did not have the power to pass the Act of 1874.

"Pearson, Chief Justice, delivers the opinion of the Court, and says: 'The General Assembly has absolute control over the finances of the State. The public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly. It follows that the courts have no power to compel by mandamus the public Treasurer to pay a

debt which the General Assembly has directed him not to pay, or the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the Act of the General Assembly be void as violating the Constitution of the United States or of this State.' And after discussing the constitutional question and holding that the Act of 1874 was not unconstitutional, he again says: 'A complete answer to the position, however, is that the Act of 1874 not only repealed the Act of 1868, but in sections 2 and 3, in so many words, forbids the Treasurer from paying and the Auditor from recognizing any claim for the principal or interest of the bonded indebtedness of the State, except as may hereafter be provided for by law.' To the same effect is the case of *Shaffer v. Jenkins,* 72 N. C., 275. It appears in that case that an act was passed in 1869, appointing a surveyor and commissioners to locate a certain road, and appropriated $5,000 for the construction of the road, and directed the Governor to issue his warrant for the payment of contractors. That afterwards, in 1871, the General Assembly passed a resolution (not an act) directing the Treasurer not to pay these or any similar warrants.' The opinion was delivered by Rodman, Judge, and in it he says: 'The Treasurer is a public officer, who has no power over the moneys of the State, except as is given to him by some act of the General Assembly, and no promise of his binds the State.' And again, after discussing the question of evidence, he says: 'We concur that his Honor in considering the evidence immaterial in this particular action, not, however, for the reason which appears to have governed him, but for the reason which will be presently discussed, that no court of this State has jurisdiction to take money out of the Treasury of the State to pay even an admitted debt of the State against an express and positive prohibition of the General Assembly and the Treasurer to pay such debt.' And again, on page 279, 'Assuming that a court of the State has jurisdiction to enforce

by the writ of mandamus the performance by the public Treasurer of a ministerial duty imposed on him by the statute, yet these cases are not authorities that such court may enforce that a payment of money forbidden by statute on the ground that a statute forbidding payment is unconstitutional.' And again, on same page, 'However this may be, the money in the Treasury is within the exclusive control of the General Assembly. No court can undertake to administer it. To do so would produce confusion, and the result might be to have the State without the means of paying the officers of the government, which would thus fall to pieces.'

"If this view of the law is correct, it is not material to inquire whether there is an appropriation under chapter 13 of the Laws of 1897, or chapter 19 of the Laws of 1899, because by chapter 21 of the Laws of 1899, if there was such an appropriation it had been withdrawn by the General Assembly, the Treasurer had been forbidden to pay, and under the authorities we have cited, this was within the power of the General Assembly.

"In the beginning of this discussion I stated that the principle involved in this case was vital. I do not believe that there is any provision in the Constitution which has been wrought out with so much expenditure of time, money and sacrifice as the provision, 'that money shall not be withdrawn from the Treasury, except in consequence of appropriations made by law,' and I believe that this power in the hands of the people of retaining control over the purse of the State is the *one* power by which they may be able to maintain their rights.

John Randolph Tucker, one of the ablest of American constitutional lawyers, in a great speech which he made in Congress in 1879, reported in the Congressional Record, of the first session of the 46th Congress, says that the 'power over the purse of the people is a part of those inherited

privileges vested by the people in this House and in the Senate, by means of which the people's representatives in the legislative department may check executive usurpation and constrain a redress of grievances. This money power was the lever by which the Saxon people upheaved the solid centralism of the Normam polity and transferred the monarchy of the Conquest into the noblest type of constitutional government in the Old World. This power over the purse in the hands of the Commons made the sword impotent in the hands of the King. The power was used there (in England) as the medicine of the Constitution; the Tudors and the Stuarts demanded supplies for their schemes of ambition in war and peace; the Commons halted on grievances; the crown sent messengers to them to hurry up supplies and adjourn without redress of grievances; but the Commons said, the purse is ours to give or to withhold; to give absolutely or on condition, abandon dangerous power and practices. Let go your hold on our liberties and we will give you money. This weapon for a people's defence, well and wisely wielded, has reformed the British Monarchy, purged away its despotic princaples, enlarged popular authority, secured personal liberty, and the personal rights of man by the splendid muniments of law and an independent judiciary, and brought the whole government under the influence and control of the will of the people. It was the light of civilization which banished the night of barbarism from the kingdom.'

"Sir Erskine May, in his Constitutional History of England, Volume 1, 440, says: 'One of the most ancient and valued rights of the Commons is that of voting money and granting taxes to the crown for the public service. From the earliest times they have made this right the means of extorting concessions from the crown and advancing the liberties of the people. They upheld it with a bold spirit against the most arbitrary Kings, and the bill of rights

crowned their final triumph over prerogative. They upheld it with equal firmness against the Lords.'

"The struggle in England to obtain control of the money of the government was long and obstinate, and extended over a period of more than a thousand years. The Commons first obtained the right to sit separate from the House of Lords. They then demanded the privilege of originating the Revenue Bill, and when they had once gained this power they used it as a defence against any encroachment upon their rights, and as a means of destroying the prerogative of the King wherever it encroached upon the rights of the people. The King came to them and demanded supplies. The Commons said, we will give you money, but you must redress grievances. The right which the people have to-day through their General Assembly to determine what appropriation shall be made and how; what claims against the State shall be paid and when, is a right derived from this great struggle between the Commons and the King, and is crystalized and preserved in that article of the Constitution to which we have referred, that 'no money shall be withdrawn from the Treasury, except in consequence of appropriations made by law.' It is this power that makes the people through the General Assembly sovereign, and which caused this same Supreme Court to say, in *Ewart v. Jones,* 116 N. C., 570: 'Under our form of government the sovereign power resides with the people, and is exercised by their representatives in the General Assembly.' The power was placed in the Constitution for the very purpose for which it was exercised in chapter 21 of the Laws of 1899, and the resolution of the adjourned session of 1900, as a check upon the other departments. Foster, in his Work on the Constitution, says, on page 298: 'The checks upon the Judiciary are the power of the Legislature to remove their members in the same manner as the Executive by impeachment. The power of either House to refuse the

appropriations necessary to carry on their business.' And again, on page 303, 'Of the three departments, the strongest is the Legislative and the weakest the Judiciary. The Legislature has the control of the purse, and can starve the other two by refusing them the supplies with which to carry on the government, and even to support themselves.' There is one part of this statement of the law which I am inclined to think will be modified in the Works upon the Constitutional Law, which are hereafter written, and that is, that the judiciary is the weakest of the three departments of government. It is within the observation of all of us that the judiciary in the exercise of the power to declare acts of the Legislature unconstitutional, has been narrowing and confining the power of the General Assembly, and has been adding to its own authority year by year, and if it is to go further than this and undertake to control the officers of the Executive branch of the government, it will soon be by far the strongest of the three departments, and not the weakest. This was apprehended when our government was formed, and the Works of Jefferson have many warnings against the encroachments of the judiciary.

"The safety of the State demands that the right of the General Assembly to control appropriations should be retained. In *State v. Beavers,* 86 N. C., 593, Judge Ruffin uses this language: 'Act as she (the State) must necessarily do through her officers and agents, her safety imperatively demands that her specific instructions shall be observed, and only such authority exerted in her name as is conferred by law. Under the law of this State there is but one power that can appropriate public money, or authorize any conversion of the State's property, and that one is the General Assembly of the State, and any officer who, having the State's money or other property in his charge, applies it to any purpose without the sanction of that branch of the State govern-

ment, is guilty of a breach of duty, however honestly it may be done.'

"But the respondents say further, that if they have been guilty of a violation of law, that it was a mistake of judgment, and not intentional. It may appear harsh to say that this defense can not avail the respondents, but we believe that a consideration of the matter will lead to the conclusion that it would be dangerous indeed to permit such a defence. The maxim, that 'ignorance of the law excuses no one,' is one of universal application, and has been applied by the respondents themselves. In *State v. The Southern Railway,* 122 N. C., 1062, the Court of which the two respondents were members, said: 'Ignorance of the law excuses no one, and the vicarious ignorance of counsel has no greater value. The law does not encourage ignorance in either.' The same defense was attempted to be made upon the trial of Andrew Johnson, and the Managers upon the part of the House of Representatives submitted their views upon the question. They said: 'But it may be urged that if an officer charged by the Constitution and his oath with the duty of executing the laws, knowingly and intentionally suspends the operations of an important statute, refuses to execute another, and violates the third, he does so with a view to promoting the public interest, his motives are good and he is not impeachable.' This view, so plausible and insidious, is nevertheless so dangerous that its very monstrous character will show that it can not be maintained. The same fatal error of opinion and conduct will be impeachable in one president who knows the right, and the wrong pursues. While another, who believes in a fallacy, because he loves it, will escape unpunished, though the inherent wrong in principle and in effect is the same in both cases.

"The subject, so far as it relates to ordinary courts, is well understood. Sedgwick, under the caption 'Good faith no excuse for violation of statute,' says: 'We have already

had occasion to notice the rule that ignorance of the law can not be set up in defense. All are bound to know the law, and this holds good as well in regard to common as to statute law, as well in regard to criminal as to civil cases. *Judges* have been impeached in England *for misinterpreting the laws,* and the Earl of Bristol for advising against war with Spain; yet these were doubtless honest, but were regarded by the impeachment power as mistaken and pernicious opinions.' It would be strange indeed if the law is in such condition that the humblest citizen of the State, who has never seen a law book, is conclusively presumed to know the law, and is held liable for every infraction of it, and that a Judge of the Supreme Court can escape because of ignorance of the law. The maxim that 'ignorance of the law excuses no one' must be modified to except Judges. And, indeed, I think it would not be contended even by the respondents, that all Judges could be excepted. And if the exception is to be allowed it would probably extend no further than the protection of the Judges of the Supreme Court. If, however, it is admitted that the Judges, in order to be liable for impeachment, must have known that they were doing wrong, that they were engaged in an illegal act, what is meant by 'knowingly'? Does it mean anything more than that it was intentionally done? And what intent is necessary to be shown? As applied to the ordinary individual, and in the ordinary affairs of life, all that would be required would be to show the intent to do the act, and upon this intent being shown, liability would follow.

"In *State v. Hatch,* 116 N. C., 1004, the members of a Board of County Commissioners were held liable to indictment and were convicted, and their conviction sustained by the Supreme Court, because they had carelessly sold shingles belonging to the county for less than the full value, and when it was found as a fact that there was no corruption, and that they had acted honestly, the court in concluding its opinion says: 'However honest the defendants may be (and

their honesty is not called in question), the public have a right to be protected against wrongful conduct of their servants, if there is carelessness amounting to a wilful want of care in the discharge of their official duties which injures the public.'

"Again, in *State v. McLean*, 121 N. C., 595, in an opinion concurred in by both of the respondents, the Court said: 'When an act forbidden by law is intentionally done, the intent to do the act is the criminal intent which imparts to it the character of an offence, and no one who violates the law which he is conclusively presumed to know can be heard to say that he had no criminal intent in doing the forbidden act. The criminal intent is inseparably involved in the intent to do the act which the law pronounced criminal.' In that case, the Mayor and the Board of Aldermen were convicted of a felony, and their conviction was sustained by the Supreme Court, the respondents concurring in the judgment, although they were acting under advice of counsel and undoubtedly believed that they had the right to do what they did do. If such rule is to be applied to the ordinary individual and to officers in the humble walks of life, can we afford to relax it when dealing with Judges upon the highest Court of our State? They have been selected as Judges, presumably upon the idea that they were experts in the law. Shall they escape responsibility for their actions upon the ground of ignorance and a want of knowledge of the effect of their conduct? I am not prepared, however, to admit that it is necessary to show that the respondents knew that they were doing an illegal act. As I have shown, this defence was not allowed upon the trial of Andrew Johnson, and I believe that a proper conception of the reasons which put in motion the powers of a Court of Impeachment will show that it ought not to be recognized anywhere. The primary object of a Court of Impeachment is not to punish, but to purge the public service; to get rid of an unworthy official;

to remove from office one whose conduct is dangerous to the public welfare. The Court has ample powers to carry into effect this purpose. There can be no doubt that the acts of a public official that are dangerous to the public do as much harm to the public service, if done through ignorance, or even from honest motives, as if done from corrupt motives, and if the purpose of impeachment is for the public good, it would seem that both should be treated alike. But if it is necessary to show knowledge and intentional wrong-doing upon the part of the respondents, we expect to furnish evidence to the Court which, we will insist, will amply justify the Court in finding that the respondents are guilty. We will point the Court to the conduct of the respondents in causing the writ of mandamus to issue, and will insist that their hesitation; that their attempts to shift the responsibility from themselves to the Clerk of the Supreme Court; their denial of the right to a member of the Court to put upon record his protest against the issuing of the writ, in connection with the fact that the Legislature had announced its purpose to assert its rights, and that their attention was directly called to the provisions of the Constitution and to the law which they were charged with violating, and that the writ was never issued until they knew Worth would pay, shows that they knew that they were doing wrong. The opinion in *White v. The Auditor* was filed on May 22, 1900. No writ of mandamus was then issued to enforce the judgment in the action. At the September Term of the Court the counsel for White applied in open Court for the writ of mandamus. The Court asked if notice had been given, and upon it being stated that no notice had been given, declined to issue the writ. In a few days another application was made, and the Court then inquired if an affidavit had been filed, and upon its being stated that there was no affidavit, again declined to consider the application. They then told the Clerk privately that in their opinion he ought to issue the writ. But Judges

Montgomery and Clark having told him that he had no power to issue the writ, he declined to do so. The counsel for White being persistent, the Clerk went to the Judges in conference and asked for instructions. They declined to give him instructions as a Court, but the respondents expressed it as their individual opinions that it was his duty to issue the writ. The Clerk not being satisfied with this direction, went to them a second time in conference, and they then directed the writ to issue; and it was issued. It was not, however, issued until the respondents had information that Worth, the Treasurer of the State, would obey the writ. And after having directed it to issue, they refused to a member of the Court the right to file his dissenting opinion and his protest against the action of the Court. Why should they have been guilty of such conduct if their motives were good? If they believed that they had the power to issue the writ, and that they were not violating any provision of the Constitution or of the law, and if they believed that the opinion filed on the 22d of May authorized the issuing of the writ, why was it that when the first application was made they did not then say to the counsel, go to the Clerk and have him to issue the writ? This was in open Court, in the face of the public. Why did they refuse the second time to issue the writ in open Court, and why is it, if it was the individual opinion of these respondents, that it was the duty of the Clerk to issue it, that they not direct him to do so when he came to them at their first conference? Their whole conduct, as we shall insist, shows that they knew that they did not have this power; that they were undertaking to shift the responsibility from themselves to the Clerk of the Supreme Court, and that they were unwilling, for the reasons urged against the issuing of the writ as contained in the dissenting opinion of Judge Clark, to be placed upon the records. We ask you, Senators, to judge of this conduct as you would of the conduct of any

other man, and say if it is the conduct of men acting honestly in the discharge of official duty.

"The answer which they have filed in this case, to our mind, confirms this view, because of its evasiveness and its lack of candor upon this material point. They undertake to create the impression in the answer that no order was ever made, and no directions given for issuing the writ of mandamus, except such as are contained in the opinion filed on May 22, 1900. If they intend to stand by this answer, and to ask the Senate to reach such a conclusion, we expect to prove that the answer, in this respect at least, is absolutely false.

"In asking you to find the respondents guilty upon the Articles of Impeachment, it is not necessary that we should attack the case of *Hoke v. Henderson.* The doctrine there announced, kept within proper bounds, is dangerous to the public service. But for the purposes of this trial we may admit that it is sound law. No one knows better than the respondents that the doctrine of that case is dangerous, and that it must not be extended. In the case of *Caldwell v. Wilson,* 121 N. C., page 468, the respondent Douglas, in an opinion concurred in by the respondent Furches, in speaking of the case of *Hoke v. Henderson,* said: 'This Court has recently had occasion to reaffirm the doctrine laid down in that oft quoted decision which has become too firmly established in the policy of our laws now to be questioned; but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried.' And in the face of that declaration, and with a full knowledge of the law, with a knowledge of the dangerous tendencies of *Hoke v. Henderson,* they

have extended its doctrines, and have practically made it impossible to abolish a public office, because they have held that an office is not abolished as long as the duties of the office remain.

"It is not my purpose to go into any discussion of what is known as the 'office-holding cases,' but we expect to show from them a partisan spirit running through all, and an attempt to prevent the people from controlling the exercise of their public offices, and to weaken the power of the General Assembly.

"We might go further and admit that the respondents are not liable to impeachment for anything that they have said or done in the office-holding cases, and still we insist that they would be guilty, because they have gone beyond all this when they put their hands in the Treasury of the State.

"This is not the first time in the history of our country in which Judges have been held to account for their conduct in office, and convictions have been sustained upon charges far less grave than those made against the respondents. About 1860, Judge Humphreys, a Judge of the United States District Court was convicted, and the fifth charge against him was 'for neglecting and refusing to hold the District Court of the United States.' This conviction was by the Senate of the United States. In 1802, Judge Addison was impeached in Pennsylvania, and two of the charges against him were: 'First, directing the jury that the address of an Associate Judge to them had nothing to do with the question before them; and, second, preventing the Associate Judge from addressing the grand jury concerning their duties, and by denying the right and by leaving the bench, and thus irregularly adjourning the Court.' In 1804, Judge Pickering was convicted by the United States Senate for ordering a ship to be restored to a claimant without producing a certificate for the payment of duty; for refusing to hear testimony of witnesses

produced to sustain the claim of the United States, and for refusing to allow an appeal from the decree which he rendered. In this last case, Judge Pickering was tried and condemned, although the first three charges contained against him were no other than that of making decisions contrary to law in a cause involving the mere question of property, and then refusing to grant the party injured an appeal from his decision, to which he was entitled. Under these precedents we might rest our case upon the charge that these Judges had rendered decisions contrary to law and against the plain letter of the law; or that they had rendered these decisions for partisan purposes. But we go further, and say that they are not only guilty of these things, but that they have been guilty of violating two express provisions of the Constitution and two plain statutes which the Legislature had the power to pass.

"It is a great case which you have to try. Upon the one hand it is important that the judiciary should be independent, and that their decisions should not be rendered under the fear of impeachment. No one appreciates this more than I do, and I wish all of the rights of the respondents to be protected. On the other hand, we have the rights of the people to guard and protect. In this controversy is embraced that right which is a source of their power, upon which the sovereignty of the people depends, and without which they can not prevent usurpations by the Executive or Judicial Departments. In this case the law is also upon trial, and the question is to be decided as to whether Judges in high places are to be held to account as private individuals; whether the same rules are to be applied to their conduct; or shall they have exemption from the rules which guide and control the conduct of other men. We are to see if place, power, position can influence the verdict of a Senate. For our part, representing the House of Representatives here as we do,

we ask no conviction of these respondents unless it is justified by the facts and by the law. We ask no conviction because they do not belong to the same political party that we do; but simply that they be tried and dealt with as other men.

"In conclusion, we commend to you the words of the great Law-Giver to the Judges of Israel: 'Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honor the person of the mighty, but in righteousness shalt thou judge thy neighbor.' "

Senator WOODARD: "I now move that the rules be suspended and that an hour be agreed upon by the counsel for the Managers and the counsel for the respondents at which this Court shall re-convene."

Senator TRAVIS: "The General Assembly has on hand much Legislative work of considerable importance. The members of the House are anxious to conclude their work and go home, and in order that the work may be concluded and gotten out of the way of this trial, I move that this Court adjourn until 12 o'clock to-morrow, in order that we may pursue our Legislative duties during the afternoon and night and early to-morrow morning."

Senator JUSTICE: "So far as I am concerned, I desire to hear from the counsel for the respondents to ascertain their desires."

Mr. JARVIS: "Speaking for the respondents, I can only repeat what I said on a former occasion: We appreciate the public duties pressing upon the Senators as Legislators, and we shall be content for them to pursue whatever course that their judgment may dictate and that the public interest requires."

Senator WOODARD: "I withdraw my motion."

The PRESIDENT: "As many as favor the motion of the gentleman from Halifax will answer when their names are called. The Clerk will call the roll."

The Clerk calls the roll and the following Senators vote in the affirmative: Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard. Forty-nine.

The motion is adopted, and is so ordered.

The Sergeant-at-Arms thereupon makes due announcement that the Court of Impeachment is adjourned until to-morrow at 12 o'clock.

SIXTH DAY.

THE SENATE CHAMBER,
Friday, March 15, 1901.

The Court of Impeachment meets pursuant to adjournment, is called to order by the President, and proclamation thereof is duly made by the Sergeant-at-Arms.

The Clerk calls the roll and the following Senators are present: Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood, Woodard. Forty-seven.

Mr. R. R. BOYD, of Rockingham County, is sworn in as stenographer.

Upon motion of Mr. LONDON, the readings of the proceedings of the last day's session is dispensed with.

Senator ARRINGTON offers the following amendment to the rules for the government of the Court of Impeachment:

Amend Rule 18 by inserting after the word "nays," in line two, the following: "Except a motion to adjourn."

Senator ARRINGTON: "Mr. President and gentlemen of the Court: That simply changes the rule so that we can adjourn without a roll-call."

The motion is duly seconded and the amendment to the rule is adopted, ayes 49, noes none, as follows:

Those voting in the affirmative are: Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee,

Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

Senator HENDERSON: "I desire to call attention to Rule 18, and I think it is misunderstood. Rule 18 says: 'All the orders and decisions shall be made and had by yeas and nays upon the demand of one-fifth of the members present.' I construe that to mean if one-fifth of the members present make the demand. If they do not make the demand, it is not necessary to have the ayes and noes. It is not necessary and not intended. Rule 7 says the Court may determine to adjourn earlier or sit longer. If a Senator makes a motion, and it is not seconded, it can not be put before the Court. It must be seconded by one-fifth of the members present. My interpretation of the rules is different, at the same time I will say nothing further at present."

The PRESIDENT: "The Court is ready to transact its business."

Mr. GUTHRIE: "The first piece of evidence we offer is the official oath of Robert M. Douglas as an Associate Justice of the Supreme Court of North Carolina."

Mr. Guthrie reads the oath as follows:

EXHIBIT "A."

NORTH CAROLINA SUPREME COURT.

OATH OF OFFICE OF ROBERT M. DOUGLAS, ASSOCIATE JUSTICE.

Filed 2d January, 1897.

STATE OF NORTH CAROLINA, Guilford County. } *Before the Clerk of the Superior Court.*

I, Ed. L. Ragan, Clerk of the Superior Court in and for said county, do hereby certify that Robert M. Douglas, of said county, personally

appeared before me this day and, exhibiting his commission as an Associate Justice of the Supreme Court of North Carolina, took and subscribed before me the following oaths, to-wit:

"I, Robert M. Douglas, do solemnly swear that I will support the Constitution of the United States. So help me God.

"RO. M. DOUGLAS."

Subscribed and sworn to before me, this 1st day of January, 1897.

ED. L. RAGAN,
Clerk of the Superior Court.

"I, Robert M. Douglas, do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities, which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability. So help me God.

"RO. M. DOUGLAS."

Subscribed and sworn to before me, this 1st day of January, 1897.

ED. L. RAGAN,
Clerk of the Superior Court.

"I, Robert M. Douglas, do solemnly swear that, in my office of Justice of the Supreme Court of North Carolina, I will administer justice without respect to persons, and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully, and impartially perform all the duties of the said office, according to the best of my abilities, and agreeably to the Constitution and laws of the State. So help me God.

"RO. M. DOUGLAS."

Subscribed and sworn to before me, this 1st day of January, 1897.

ED. L. RAGAN,
Clerk of the Superior Court.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court, at my office in the city of Greensboro, on this the 1st day of January, A. D. 1897, and in the one hundred and twenty-first year of our American Independence.

[Official Seal.]

ED. L. RAGAN,
Clerk of the Superior Court.

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE,
RALEIGH, *March 4, 1901.*

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached two (2) sheets to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 4th day of March, in the year of our Lord 1901.

[Official Seal.] J. BRYAN GRIMES.
Secretary of State.

Mr. GUTHRIE: "The next piece of evidence we offer is the official oath of David M. Furches as an Associate Justice of the Supreme Court of North Carolina."

Mr. Guthrie reads the oath as follows:

EXHIBIT "B."

I, David M Furches, do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities, which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; and to support the Constitution of the United States. So help me God.

And I do further swear that in my office of Associate Justice of the Supreme Court of North Carolina, I will administer justice without respect to persons and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office, according to the best of my abilities and agreeably to the Constitution and laws of the State. So help me God.

DAVID M. FURCHES.

Sworn and subscribed to before me this 1st day of January, 1895.

A. C. AVERY,
Associate Justice Supreme Court.

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE.
RALEIGH, *March 4, 1901.*

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached one (1) sheet to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 4th day of March, in the year of Lord 1901.

[Official Seal.] J. BRYAN GRIMES,
Secretary of State.

Mr. GUTHRIE: "The next piece of evidence we offer is the official oath of David M. Furches as Chief Justice of the Supreme Court of North Carolina."

Mr. Guthrie reads the oath as follows:

EXHIBIT "C."

D. M. FURCHES, CHIEF JUSTICE—OATHS OF OFFICE.
Filed January 7, 1901, at 12.20 p. m.

I, David Moffatt Furches, do solemnly swear that, in my office of Chief Justice of the Supreme Court of North Carolina, I will administer justice without respect to persons, and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office, according to the best of my abilities and agreeably to the Constitution and laws of the State. So help me God.

DAVID MOFFATT FURCHES.

Sworn and subscribed before me this 7th of January A. D. 1901.
WALTER A. MONTGOMERY,
Associate Justice of the Supreme Court of North Carolina.

I, David Moffatt Furches, do solemnly and sincerely swear that I will be faithful and bear true allegiance to the State of North Carolina, and to the constitutional powers and authorities, which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability. So help me God.

DAVID MOFFATT FURCHES.

Sworn and subscribed before me this 7th of January, A. D. 1901.

WALTER A. MONTGOMERY,
Associate Justice of the Supreme Court of North Carolina.

I, David Moffatt Furches, do solemnly swear that I will support the Constitution of the United States. So help me God.

DAVID MOFFATT FURCHES.

Sworn and subscribed before me this 7th day of January, A. D. 1901.

WALTER A. MONTGOMERY,
Associate Justice of the Supreme Court of North Carolina.

STATE OF NORTH CAROLINA,
OFFICE OF SECRETARY OF STATE,
RALEIGH, *March 4, 1901.*

I, J. Bryan Grimes, Secretary of State of the State of North Carolina, do hereby certify the foregoing and attached two (2) sheets to be a true copy from the records of this office.

In witness whereof, I have hereunto set my hand and affixed my official seal.

Done in office at Raleigh, this 4th day of March in the year of our Lord 1901.

[Official Seal.]

J. BRYAN GRIMES,
Secretary of State.

Mr. GUTHRIE: "The next piece of evidence we offer, Mr. President, is a certified copy of the record, certified by the Clerk of the Supreme Court of North Carolina, in the case of *White v. The Auditor and Treasurer.*"

Mr. Guthrie reads the copy as follows:

EXHIBIT "D."

WHITE
v.
AUDITOR and TREASURER. } FROM PERQUIMANS.

Before STARBUCK J. Defendant Appealed.

NORTH CAROLINA—Perquimans County.
Superior Court, December 2, 1899.

Be it remembered, that on the 30th day of November, 1899, Theophilus White, as plaintiff, and H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer, as defendants, agreed upon and submitted to

the judge of the Superior Court, holding the courts of the First Judicial District, a controversy without action, as follows:

CONTROVERSY SUBMITTED WITHOUT ACTION.

NORTH CAROLINA—County of.....

Theophilus White
against
H. W Ayer, State Auditor, and W. H. Worth, State Treasurer.

The parties hereto desire to submit a controversy without action under the provisions of The Code, sections 567 and 568, and they agree that the case may be constituted in the Superior Court of the county of Perquimans, and be heard before the judge holding the courts of the First Judicial District at any time and place that may be convenient to the judge holding the courts of said district.

The facts agreed are as follows:

The General Assembly of North Carolina in 1897 passed an act to provide for and promote the oyster industry of North Carolina, ratified February 23, 1897, being chapter 13 of the Laws of 1897. This act is made a part of the case.

That on the 23d day of February, 1897, the plaintiff was duly appointed by the Governor of North Carolina, under the provisions of said act, Chief Inspector for the constitutional term of four years, and was duly commissioned as such, and was inducted into said office and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in section 13 of the act.

The General Assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shell-fish industry of the State, ratified March 2, 1899, being chapter 19 of the Laws of 1899. Under this act, the persons named in section two (2), namely: George H. Hill, of Washington, Beaufort County; B. D. Scarboro, of Avon, Dare County; Daniel L. Roberts, of New Bern, Craven County; Robert W. Wallace, of Beaufort, Carteret County; C. C. Allen, of Elizabeth City, Pasquotank County; J. M. Clayton, of Englehard, Hyde County; and Daniel B. Hooker, of Bayboro, Pamlico County undertook to discharge the duties of Shell-Fish Commissioners, under the claim that the act of 1897 was repealed by the act of 1899.

That the persons named in the preceding paragraph, having undertaken, under the title of Shell-Fish Commissioners, to discharge the duties devolving upon the plaintiff as Chief Inspector, and having taken possession of the Steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the Supreme Court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case.

That since the 15th day of March, 1899, up to November 20, 1899, the defendant H. W. Ayer, Auditor of the State, has refused to issue to the plaintiff a warrant for the sum of seventy-five dollars per month and his actual travelling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the Act of 1897; and the defendant W. H. Worth, State Treasurer, for the same period of time, has refused to pay the salary and travelling expenses of the plaintiff as Chief Inspector, and also the fifty dollars per month claimed by the deputy inspectors.

That since the opinion of the Supreme Court has been filed the plaintiff has again demanded of the Auditor the issuance of a warrant in his favor for the amount of his salary and expenses, and the same has been refused by the defendants. The defendants base their refusal upon the Acts of 1899, chapter 21, which is made a part of this controversy.

The plaintiff insists that the decision of the Supreme Court, hereinbefore mentioned in the facts agreed, that he is entitled to a salary of seventy-five dollars a month and actual traveling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chapter 21, Acts of 1899, above mentioned, He asks that a mandamus issue to the defendant, the State Auditor, requiring him to issue a warrant for the amount due him under the law, and also that a mandamus issue, directed to the State Treasurer, requiring and compelling him to pay the same, and for all further relief which, under the facts above mentioned and the law of North Carolina, he is entitled to.

It is further agreed as a part of the foregoing case agreed that no part of the compensation as provided in chapter 19, Public Laws of 1899, has been paid to the persons therein named as Shell-Fish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws of 1897, and chapter 19, Laws of 1899, an amount sufficient and available for the payment of such salary and travelling expenses as plaintiff may be entitled to.

J. C. L. HARRIS,
Counsel for Theophilus White.
F. H. BUSBEE,
Counsel for H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer.

Hal W. Ayer, being duly sworn, says that the controversy, without action, which is hereby submitted, is real, and that the proceedings are in good faith to determine the rights of the party thereto.

HAL W. AYER.

Sworn to and subscribed before me, this the 30th day of November, 1899.

BAYLUS CADE,
Notary Public.

[Seal.]

W. H. Worth doth solemnly affirm that the controversy without action, which is hereby submitted, is real, and that the proceedings are in good faith to determine the rights of the party thereto.

W. H. WORTH.

Affirmed before me, this the 30th day of November, 1899.

BAYLUS CADE,
[Seal.] *Notary Public.*

Theophilus White solemnly affirms that the controversy without action, which is hereby submitted, is real, and that the proceedings are in good faith to determine the rights of the parties thereto.

THEOPHILUS WHITE.

Affirmed before me, this the 30th day of November, 1899.

BAYLUS CADE,
[Seal.] *Notary Public.*

That the said controversy was submitted under the provisions of law to the Honorable Henry R. Starbuck, Judge Superior Court, holding the courts of the First Judicial District, and thereupon his Honor filed the following judgment:

JUDGMENT.

NORTH CAROLINA—Perquimans County.
Superior Court.

Theophilus White
against
H. W. Ayer, State Auditor, and W. H. Worth, State Treasurer.

This cause coming on to be heard before Starbuck, Judge, upon the facts agreed, it appears that the Supreme Court, in the cause entitled "State *ex rel.* Theophilus White v. Geo. H. Hill, *et al.*," has held that chapter 19, Public Laws of 1899, is void in so far as it undertakes to appoint the persons therein named to the offices of Shell-Fish Commissioners therein undertaken to be established, and that chapter 18, Public Laws of 1899, is void in so far as it undertakes to repeal that part of chapter 13, Public Laws of 1897, which created the office of Chief Inspector of Shell-Fish, to which office plaintiff was duly appointed.

The Court is of opinion that the plaintiff is entitled to receive salary and expenses as provided under Chapter 13, Laws 1897, unless payment of the same has been prohibited by chapter 21, Public Laws 1899, which directs the State Treasurer shall not pay any compensation for services

rendered concerning the shell-fish industry unless such persons are authorized to render such services under the provisions of chapter 19, Laws 1899.

It is manifest that the General Assembly, by enacting said chapter 21, did not intend that the Chief Inspector should perform the duties of his office without compensation therefor.

It is equally manifest that said chapter was enacted upon--and would not have been enacted but for--the assumption that by chapter 18 the office of Chief Inspector had been abolished, and that by chapter 19 the persons named therein had been appointed to the offices of Shell-Fish Commissioners.

The Court is therefore of opinion that said chapter 21 is dependent upon and falls with those parts of chapter 18 and 19 which have been held to be void.

It further appears that said chapter 19, Laws 1899, which provided for the appointment of seven persons as Shell-Fish Commissioners, further provides that "each of the said Commissioners shall receive as compensation the sum of $400 per annum."

It is manifest that by said provision the General Assembly did not intend to increase the salary of the Chief Inspector to $2,800 or to diminish it to $400, but to provide compensation for the seven Commissioners undertaken to be appointed.

The Court is of opinion that said provisions as to compensation can not be construed as amendatory to chapter 13, Laws of 1897, but is dependent upon and falls with the void provision as to the appointment of Shell-fish Commissioners.

It is hereupon adjudged that plaintiff is entitled to receive a salary of $75 per month and actual travelling expenses, as provided under chapter 13, Public Laws of 1897, from March 15, 1899, up to the present time; and it is further ordered and adjudged that a mandamus issue directed to H. W. Ayer, the State Auditor, commanding him to issue a warrant for the amount due the plaintiff under chapter 13, Public Laws of 1897; and that a mandamus issue directed to W. H. Worth, State Treasurer, commanding him to pay to plaintiff said amount.

H. R. STARBUCK,
Judge Presiding First Judicial District.

To the foregoing judgment the defendants excepted. Exception overruled. Appeal prayed by defendants. Notice waived. Appeal bond adjudged unnecessary. The controversy without action and the judgment to constitute the case on appeal.

December 4, 1899.

J. C. L. HARRIS,
Attorney for Plaintiff.
F. H. BUSBEE,
Attorney for Defendants.

NORTH CAROLINA—Perquimans County.

I, E. V. Perry, Clerk of the Superior Court of Perquimans County, in the State aforesaid, do hereby certify that the foregoing contains a true, full and perfect transcript of the record in the above-entitled controversy without action, pending in the Superior [Court] of said county between Theophilus White, plaintiff, and Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, defendants.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Hertford, this the 6th day of December, 1899.

E. V. PERRY.

[Seal.] *Clerk Superior Court Perquimans County.*

A true copy of record on file in Supreme Court, furnished Mr. Guthrie February 20, 1901.

[Seal.] THOS. S. KENAN, *S. C. C.*

Docketed in Supreme Court December 8, 1899. Argued December 19, 1899, by J. C. L. Harris for plaintiff, F. H. Busbee and Cook & Green for defendant. *Advisari.* Opinions handed down May 22, 1900 (and are published in 126 N. C. Reports, pages 570 to 614 inclusive.)

Mr. GUTHRIE: "The next piece of evidence we offer is a certified copy of the judgment of the Supreme Court in the case of *Theophilus White v. Hal W. Ayer and W. H. Worth.*"

Mr. Guthrie reads the copy as follows:

EXHIBIT "E."

JUDGMENT.

NORTH CAROLINA—SUPREME COURT.
NO. 18, PERQUIMANS COUNTY.

Theophilus White
against
H. W. Ayer, Auditor, and W. H. Worth, Treasurer of North Carolina.

This cause coming on to be heard, it is adjudged that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899, chapter 19, to-wit, the sum of four hundred dollars per annum, and five cents per mile travel, when engaged in his work, and extra expenses not to exceed fifty dollars per annum, and that the same be paid by the

Treasurer of the State out of the oyster fund appropriated by the Act of 1897 and the Act of 1899, admitted to be now in the Treasurer's hands; *Provided, however*, that the expenses of the Commission do not exceed the sum of six thousand dollars per annum.

It is further adjudged that the certificate and warrant shall be issued in the manner indicated in the opinion filed in this action, and that the defendants pay the costs of appeal.

W. T. FAIRCLOTH,
Chief Justice.

Certified copies made and delivered to J. C. L. Harris, Attorney, on October 4, 1900, at his request. Fee paid. K.

STATE OF NORTH CAROLINA,
In the Supreme Court.

Theophilus White
against
H. W. Ayer, Auditor, and W. H. Worth, Treasurer.

The State of North Carolina
to Hal W. Ayer, State Auditor—GREETING:

This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to issue. From which judgment the defendants appealed to this Court, where het judgment of the Court below was modified in amount of the recovery, and, as modified, the judgment of the court below was affirmed; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum, as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile traveled when engaged in the business of said Commission, and for other extra expenses not to exceed fifty dollars per annum—whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the court that the defendant Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified by the Secretary of the Board of the Shell-Fish Commission, and countersigned by the Chairman of the Shell-Fish Commission.

Now therefore you are hereby commanded, absolutely and peremptorily, without delay, to proceed to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as you shall find to be due the plaintiff thereon; and that in all things you

comply with and obey the mandates and requirements of this writ, and that herein you fail not.

Witness, Thomas S. Kenan, Clerk of our said Court, at office, in Raleigh, this the 17th day of October, 1900.

THOS. S. KENAN,
Clerk of the Supreme Court.

[Seal of the Supreme Court of the State of North Carolina.]

Endorsed: "Received October 17, 1900, and served same day by delivering the original of the within to Hal W. Ayer, State Auditor.

"R. H. BRADLEY,
"*Marshal of the Supreme Court of North Carolina.*"

"Fee paid. R. H. B."

Mr. GUTHRIE: "The next piece of evidence we offer is a letter, dated October the 10th, 1900, from J. C. L. Harris, attorney for Theophilus White, to the Clerk of the Supreme Court——"

Mr. OSBORNE: "We don't see the pertinence of the letter with reference to this case, your Honor. What difference does it make? How would that bear on the guilt or innocence of these parties. That is our first proposition. Our next proposition is, that the letter is not true."

Mr. GUTHRIE: "Mr. President, as to the form of the evidence, it is a letter addressed to an officer in his official capacity. In the next place, the officer certifies under the seal of his office that he has the original letter on file. We think that that is a competent way to prove it."

Mr. OSBORNE: "Let us see the contents of the letter."

Mr. F. H. BUSBEE: "Whether or not, Mr. President, the Managers will be able to prove hereafter, in a proper way, a demand made for an issuance of that or any writ, surely they can not make it a part of the record. The record is such as prescribed by law, and the mere certificate of a clerk concerning this particular case does not make it a record."

Mr. GUTHRIE: "Mr. President, we expect to introduce the original. If they insist upon their objection—it is purely

technical—we will offer the original later. Do I understand that they insist upon their objection?"

Mr. BYNUM: "Yes."

Mr. GUTHRIE: "I will state to the Court that the purpose for offering this evidence is to show that a demand was made on the 10th of October for the issuing of these writs. In their answers the respondents claim that there had already been a judgment that the writ should issue, and that judgment was dated May 22, 1900. We will offer to show that the demand was made in October, and that no writs had theretofore been issued."

The PRESIDENT: "Do you desire a ruling of the Court?"

Mr. GUTHRIE: "We withdraw it for the present."

Mr. BUSBEE: "We understood your Honor to say that the letter is withdrawn. It is not the letter that is withdrawn, but a copy of this letter. This is not the original."

Mr. GUTHRIE: "The next piece of evidence which we offer, Mr. President, is a certified copy of the mandamus writ, which was issued to Hal W. Ayer, State Auditor, and W. H. Worth, Treasurer, and dated October 27, 1900, certified by the Clerk of the Supreme Court."

Mr. Guthrie reads the copy as follows:

STATE OF NORTH CAROLINA—In the Supreme Court.

Theophilus White
against
H W Ayer, Auditor, and W. H. Worth, Treasurer.

The State of North Carolina to W. H. Worth,
State Treasurer – Greeting:

This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment, and the writ of mandamus ordered to issue. From which judgment the defendants appealed to this court, where the judgment of the court below was modified in amount of the recovery, and as modified, the judgment of the court below was

affirmed ; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum, as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile traveled when engaged in the business of said Commission, and for other extra expenses not to exceed fifty dollars per annum—whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the Court that the defendant Hal W. Ayer as State Auditor, shall pass upon and audit said claims upon the same being properly certified by the Secretary of the Board of the Shell-Fish Commission, and countersigned by the Chairman of the Shell-Fish Commission ; and it being further declared that the defendant W. H. Worth, State Treasurer, shall pay the amount stated in the warrant drawn by the defendant Hal W. Ayer, as Auditor, aforesaid.

Now, therefore, you are commanded absolutely and peremptorily, without delay, to pay the warrants issued as aforesaid by the State Auditor on you as State Treasurer in favor of plaintiff ; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

Witness, Thomas S. Kenan, Clerk of our said Court, at office in Raleigh, this seventeenth day of October.

THOS. S. KENAN,
Clerk of the Supreme Court.

[Seal of the Supreme Court of the State of North Carolina.]
Fee paid.

Endorsed :—" Received October 17, 1900, and served same day by delivering the original of the within to W. H. Worth, State Treasurer.

" R H. BRADLEY,
" *Marshal of the Supreme Court of North Carolina.*"
" Fee paid. R. H. B."

A true copy of originals on file in Supreme Court, furnished Mr. W. A. Guthrie, at his request, February 21, 1901.

THOS. S. KENAN, *S. C. C.*

[Seal of the Supreme Court of the State of North Carolina.]

Senator LONDON: "As the hour of adjournment is 1 o'clock, by the rules, and in order that we may dispatch more business before adjournment, I offer the following order:

"Ordered: That the Court sit until 2 p. m. to-day, and take a recess until 3:30 p. m."

Senator FOUSHEE: "I am opposed to this resolution. We have fixed our hours; I think we had better stick to them. My observation is that dispatch of business is accomplished by regularity. I am opposed to this resolution."

Senator LONDON: "Mr. President, I will withdraw the resolution."

Mr. GUTHRIE: "I want to see one of our witnesses and I will ask leave to have him called. He is probably in the hall—Mr. E. V. Perry."

Mr. MORRISON: "I move that the Court now take a recess until 3 o'clock."

A sufficient number second the motion and the President announces that the Court takes a recess until 3 o'clock.

The Sergeant-at-Arms makes due proclamation that the Senate stands adjourned until 3 o'clock.

Afternoon Session.

The Court reconvenes at 3 o'clock and is called to order by the President.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Bray, Broughton, Brown, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Vann, Ward, Warren, Webb, Wood and Woodard. Forty-five.

Senator LONDON: "After consultation with the counsel for the respondents and the Managers I offer the following order:

"Ordered: That the Court will sit on Saturdays from 10 a. m. to 2 p. m., and on Mondays from 12 m. to 2.30 p. m., and from 4 p. m. to 6.30 p. m."

The motion is lost—ayes 16, noes 28, as follows:

Those voting in the affirmative: Messrs. Alexander, Arrington, Broughton, Candler, Foushee, Henderson, Lindsay, London, Long, Miller of Caldwell, Morton, Scott, Smith, Speight, Stikeleather, Thomas.

Those voting in the negative are: Messrs. Bray, Brown, Burroughs, Crisp, Dula, Foy, Glenn, Gudger, James, Justice, Leak, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Pamlico, Morrison, Pinnix, Robeson, Stringfield, Sugg, Vann, Ward, Warren, Wood, Woodard.

J. C. L. HARRIS, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination by Mr. WATSON:

Q. Will you please inform the Court as to what counsel appeared in the case of Theophilus White against the State Treasurer and the Auditor? A. No one except myself for the plaintiff; Mr. F. H. Busbee and Mr. C. A. Cooke represented the defendants.

Q. In what county was that proceeding instituted? A. In Perquimans, I think.

Q. Was it a suit commenced by summons or a submission of a controversy without action? A. A controversy without action.

Q. Where were the facts agreed to for submission made up? A. In the city of Raleigh.

Q. Were the Auditor and Treasurer present? A. No, sir.

(Respondents object to the question, on the ground that the record is not attacked in the Articles of Impeachment although therein referred to.)

The PRESIDENT: "I hold that the evidence is competent."

Q. Were the defendants in that case present when the facts were made up and reduced to writing? A. No; they were not present when the facts were agreed to.

Q. Who agreed upon the facts? A. Mr. F. H. Busbee and myself.

Q. Were you present when the affidavits were made by the two defendants Worth and Ayer as to its being a real controversy? A. I do not know that I was present at the very moment the affidavits were signed; but I drew the jurat and I handed a typewritten copy to Mr. Ayer or to Mr. Worth for them to swear to, and afterwards it was handed to me sworn to before Mr. Cade as Notary Public.

Q. He was Private Secretary to Governor Russell? A. Yes.

Q. What was done with the papers after they had been made out and sworn to? A. They were sent to Judge Starbuck; I think he was at Washington, N. C., at that time, or in Plymouth. I am not certain which. I think he was in Washington.

Q. The Fall Term of Perquimans Court had passed? A. I think so; that is my recollection.

Q. You sent them to him somewhere in the First District? A. Yes.

Q. Do you remember the day the defendants swore to the facts agreed? A. I do not now.

Q. The case was then carried by the defendants to the Supreme Court? A. After the decision of Judge Starbuck; yes.

Q. It was argued at the same session of the Supreme Court? A. I think so.

Q. By whom were the parties represented? A. I appeared alone for the plaintiff, and I think Mr. F. H. Bus-

bee and Mr. C. A. Cooke represented the State. I think they both argued it for the defendants.

Q. Was the Attorney-General at any time counsel or was he consulted? A. Not that I know of.

Q. Did the Court render a decision at that term or take an *advisari?* A. I think they rendered a decision at that term.

Q. Do you remember what time the opinion was handed down? A. I do not remember the date exactly; I think it was late in the session, and not long before the Court took its final adjournment.

Q. In May, 1900? A. Yes; I think so.

Q. When was the next time you took any steps towards enforcing the judgment? A. I do not recollect the date exactly; sometime after Court met at the Fall session in September.

Q. You do not remember whether it was in the month of October or not? A. I do not.

Q. What was the first thing you did? A. The first thing I did I had a talk with the late Chief Justice.

Q. In or out of Court? A. Out of Court.

Q. What was the next thing you did? A. I think it was probably on the following morning, I went into Court and made a motion asking the Court to direct Colonel Kenan, the Clerk, to issue a writ of mandamus against the Auditor and the Treasurer.

Q. What was done and said? A. I think that after I had gotten through my remarks to the Court, Judge Furches asked me if I had given notice to the other side, or perhaps it may have been the Chief Justice, I am not sure. That question was asked me from the Bench. I stated that I had not, for I did not consider they were entitled to any notice.

Q. Was the full bench sitting? A. Yes; all five were there. I said I did not think the other side was entitled to

notice; that under the final judgment I was entitled to a peremptory writ of mandamus. They intimated they would not hear the motion unless I gave notice to the other side. That ended the matter that day. As I came out of Court I saw Mr. F. H. Busbee somewhere. * * *

Q. Did you then give notice to the defendants? A. I did, to him. I ascertained from him that he could not be here the following morning as he was going out of town, and I telegraphed Mr. C. A. Cooke. He came up on the first train, and was in the Court next morning.

Q. Then what did you do? A. I renewed my motion before the Court, telling them that Mr. Cooke was present.

Q. The Court was in session? A. Yes, a full bench. I told them that Mr. Cooke was present and waived any notice he was entitled to, and that as I understood from him he thought the writ ought to issue, and that I was entitled to it. Judge Furches then asked me if I had filed any affidavit or had one. I said no, that I did not think it was required; that I was entitled to the writ, and the Court thereupon intimated they would not hear the case except upon affidavit, and that ended the matter that day.

Q. Who did the talking? A. Judge Furches, I think.

Q. Did Mr. Cooke speak at all in there? A. I think not.

Q. You did the talking on your part? A. Yes.

Q. And you declined to make any affidavit? A. I did not decline; I thought it unnecessary to make one; I had not prepared one, and had not one to offer.

Q. You did not intend to make any affidavit, did you? A. No, sir.

Q. And you never did have an affidavit, did you? A. No, sir.

Q. You did not want to raise an issue, did you? A. There was a reason in my mind why I did not see fit to file an affidavit.

Mr. C. M. COOKE, counsel for respondents: Q. Was that communicated to the Court? A. No, sir.

Mr. COOKE: "I do not know what may be the rule in this Court. In some impeachment trials a ruling of the chair may be appealed from to the Court."

The PRESIDENT: "You will have to be satisfied with the ruling of the Chair unless some member of the Court calls for a division."

Mr. COOKE: "Our contention is what may have been his intention can not affect these respondents. The fact that he did not file an affidavit is a fact, but what his intention may have been can not be received against these respondents We do not see how it can be competent."

The CHAIR sustains the objection of the respondents.

Mr. F. H. BUSBEE: "I ask your Honor to strike out 'I had a reason,' or 'there was a reason in my mind,' etc."

Senator WOODARD: "I should like to know, when there is a question in the mind of the Court as to the correctness of the ruling of the Chair how that question is to be determined. Whether it will be upon a motion of a Senator to go into executive session, or conference, or by division in the Court here? I am asking this question for information."

The PRESIDENT: "You will call for a division."

Senator WOODARD: "Is the Court then to discuss the matter in public?"

The PRESIDENT: "I do not think it is debatable."

Mr. GUTHRIE: "As we understand the question, Mr. Watson asked the witness if he filed an affidavit; the witness said no. That the witness undertook to give the reason why he did not file it; but he was not asked for that. Whether the reason was good or bad, we do not want that. We simply ask that the question, 'Did you file an affidavit,' to which the witness replied, 'No,' shall go down. That is far enough."

The question and answer "You never intended to file it, did you;" Answer, "No," is stricken out.

Senator LONDON: "Referring to the enquiry of the Senator from Wilson, I will state what was decided by the Chief Justice in the impeachment trial of 1871 of Governor Holden. When a question of evidence was under consideration, the proceeding in the first instance was for the presiding officer to decide it, and then, upon request of one-fifth of the members present, it would be decided by the Court. And the question they put was, 'Senators, you who are of the opinion that the proposed evidence is admissible, answer aye; those of the contrary opinion will answer, no.' That was the form used in the trial of Andrew Johnson, President of the United States, and of Governor Holden of this State."

Senator WOODARD: "The question is when a division is called for is there any discussion of the matter among the members of the Court; is there any procedure by which the members of the Court can consider the question. ?"

Senator LONDON: "Yes, sir. It is not necessary to go into executive session."

Mr. WATSON: "I am inclined to think the rule is this: Upon motion of any Senator, the Senate may, if it sees proper, go into executive session to discuss any question. Otherwise, the Senate votes to sustain or not to sustain the ruling of the Chair upon a division being called for. But at any time the Senate may go into executive session, if the Senators think the matter should be discussed in executive session."

Senator FOUSHEE: "It seems to me that either side ought to have the right to appeal from the ruling of the Chair, and I give notice now that I shall later introduce a rule to that effect."

The PRESIDENT: "I am of the opinion that both sides will have to be satisfied with the ruling of the Chair

unless some member calls for a division, and if it is seconded by one-fifth of the Senators present the question will be presented to the Court."

Mr. CHAS. M. BUSBEE: "You will find the law set out in sub-division 4 of section 27 of The Code just as you have announced it."

Examination resumed:

Mr. WATSON: Q. The Court refused your motion the second time upon the ground that there was no affidavit filed? A. They declined to hear me unless I filed affidavit.

Q. What then became of it? A. I then called upon Colonel Kenan. I do not recollect whether it was that day or the next, or when it was, but I called upon him, and demanded that he issue the writ.

Q. Within a day or so—the same day or the next? A. I think so. Not further than the next day, I think. I kept no memoranda and can not give exact dates. I made demand upon him and he demanded that I put it in writing.

Q. You put it in writing? A. Yes; and filed it that day.

Q. This memorandum or letter bears the true date? A. Yes, I think so.

(Letter handed witness.)

Q. Is this the letter you filed with him? A. Yes; except that I thought it was typewritten.

Q. What was your next step? A. That is the last thing I did concerning the writ. I left either that day or that night for Washington, and was gone probably a week from the city.

Q. You had talked to the Auditor and the Treasurer about this matter, and reported to the Court, had you not, that they were instructed not to audit your claim or to pay you it, had you not?

Mr. COOKE: "I object."

Q. What did you say to them as to the conference with the

Governor and these two executive officers? A. I think I stated on my second appearance before the Court that the Auditor would not issue the warrant until a writ was issued and served upon him and that the Treasurer would not pay it unless a writ was issued and served upon him; that they had been so advised by Governor Russell, and that the warrant would not be issued by the Auditor or paid unless the writ issued.

Q. Do you remember about saying anything about the jail doors having to be opened before they would pay? A. I do not think I made that statement to the Court.

Q. Did you make the other statement? A. I think so.

Q. Did you say anything about the Governor having warned the two officers they would be impeached? A. I do not think I made any such statement to the Court.

Q. Did you make any such statement to either one of the respondents? A. I did not. I never had any talk with Judge Furches about this off the bench and only one single remark to Judge Douglas. I was going down the street, and he was coming towards the court, and I met him opposite the Governor's office. Something was said about the White case, and the Judge remarked in reply, 'I reckon you will get your money." That is all that occurred between Judge Douglas and myself. That was before the writ was issued.

Q. How long before? A. Not long before. While the matter was up. It was not many days before the writ issued.

Q. Were you before the Court any more after Judge Douglas made that remark? A. I think not.

Q. I believe you say that shortly after the filing of the opinion of the Court in *White v. Auditor,* in May, the Court adjourned? A. I think so.

Q. And you made no effort towards getting the writ until its Fall sitting? A. Yes.

Q. Soon after they met you made your motion looking

towards obtaining the writ of mandamus? A. As soon as I got the accounts I made the motion.

Q. After you got back the writ had been issued and you took the accounts and had them audited, and received the money as counsel for White? A. Yes.

Q. Do you remember Judge Furches saying when you asked for the writ the second day that the Court could not order the writ to issue because they had nothing to act upon?

Mr. F. H. BUSBEE: "I think we might as well object now to the repeated attempt of counsel to put language in the witness's mouth. Because this is a Court of Impeachment and not a Superior Court I do not apprehend that the rules are to be ignored.

Mr. WATSON: "I only want to get this answer from the witness: was any reason given by the Judges after the Court would not act without an affidavit."

Q. Did Judge Furches say they could not or would not issue the writ? A. I do not know that he gave any reason from the bench, other than what was implied in his question as to whether I had an affidavit ready to submit to the Court, and I said "No." I think then the Chief Justice said they would not or could not hear it unless there was something before them.

Q. Do you remember whether anything was said about what facts were necessary to be proved or what they desired? A. No; nothing of the sort was said.

Q. At the time you went before the Court did you exhibit the claims of White for salary and mileage? A. No; I think I had them in my pocket; I certainly had them in my possession, either in my pocket or in my office.

Senator WOODARD: "May I ask what particular time the counsel refers to."

Mr. WATSON: "To the time he applied for the writ of mandamus."

The PRESIDENT: "When a Senator desires to ask a question he will write it out and send it to the presiding officer, who will read it."

Q. At the time you sent the paper to Judge Starbuck, had you made up your mind as to what county they were to be docketed? A. .....

Q. Did you date the record you sent to Judge Starbuck? Was it any more than a skeleton case you sent to Judge Starbuck?

(Counsel for respondents enter an objection because the Managers have not attacked the record, but rely upon it and set it up fully, and because they are now seeking by this examination to attack the record; and if not, their questions are improper, irrelevant and incompetent, and of no avail.)

Mr. WATSON: "We did attack the case of *White v. Auditor*. We say that the Court had no jurisdiction, and that it was not according to the usual course of the Court. And later, Mr. President, we propose to offer this record to show the condition it was in when sent, to show the condition the transcript was in when returned to the Supreme Court."

Q. Did Judge Starbuck file the judgment n Perquimans Court, or send it to you?

Counsel for respondents object.

Mr. C. M. BUSBEE: "I want to call the attention of the Court to Article 4 of the Articles of Impeachment. We are necessarily compelled to introduce the record, not for the purpose of confirming its validity as a record, but to show that it was not within the jurisdiction of the Superior Court of Perquimans or within the jurisdiction of the Supreme Court upon appeal. It is necessary for us to put the record in evidence for the purpose of sustaining the 4th Article of Impeachment. How can we show the record in the

Superior Court of Perquimans was invalid or worthless unless we introduce the record and exhibit it to the Court. We say, in sub-section 2,that these mandamus writs were directed to be issued in wilful disregard of the statutory provisions relating to the application for writs of mandamus. And it is necessary to introduce the record to sustain that Article of Impeachment. We say, in sub-section 3, that the mandamus writs were directed to be issued, and were issued as aforesaid, contrary to the course, practice and procedure of the said Supreme Court of North Carolina. And it is necessary to introduce the record to show the institution of this controversy and its progress from the day it was instituted until the final judgment was entered in the Supreme Court, which it is claimed was contrary to the course, practice and procedure of that Court. It is necessary to show the record evidence from the beginning of the cause up to the entry of the final judgment to prove the specifications of the Articles of Impeachment."

Mr. BYNUM: "The witness has been interrogated by the counsel for the Managers as to the manner in which the record was made up and transmitted to Judge Starbuck. They are seeking to hold these respondents responsible for what the counsel and Judge Starbuck did. To that we object. These respondents, Mr. President, are responsible only for their decision which they rendered upon that case agreed as it came before them. They are not responsible, and should not be sought to be held responsible, for what took place between Judge Starbuck and the counsel. The case was prepared by counsel representing the respective parties to the case. The counsel for the Managers have not attempted to show that these respondents had any knowledge of the manner in which the transcript was prepared. We respectfully submit that until they first connect the respondents with the manner in which the case was prepared, this controversy

can not affect them, and ought not to be received in the Court. I can not understand upon what principle the counsel offer it. I can not understand how they can contend that these respondents are liable for what took place between the Superior Court Judge and the counsel of the parties in the case agreed. When the transcript was presented to the Supreme Court of North Carolina and they rendered their decision upon it, they were responsible for that decision, and are here ready to answer for the consequences of that decision. But it would be unjust to attempt to hold them responsible for anything of which they had no knowledge and with which they had nothing to do."

Mr. WATSON: "We say that it did appear to this Supreme Court when this case came up before them these facts: That here was a plaintiff asking for an order to draw money out of the State Treasury. The action was not commenced by summons and a verified complaint as the statute in regard to mandamus says it shall be commenced. But it was commenced as a submission of the controversy without action against a public officer, not in the county where that public officer lives and where he gave his bond, but in a remote county in North Carolina. The transcript which came before the Supreme Court showed that that submission of controversy without action was verified by both the defendants and the plaintiff before the Private Secretary of the Governor in the city of Raleigh in the county of Wake. That Theophilus White had left his home and had gone to the city of Raleigh, and there had gone into the office of the Governor's Private Secretary and made affidavit to this statement of facts. Not that they were true, but that it was a real controversy between the parties; and notwithstanding the plaintiff was here having his counsel in the city of Raleigh with nothing to do but to submit it to the Court that held the judicial district in which Wake County was situated, they

prepared this paper on the 30th of November and got it before Judge Starbuck somewhere. Neither counsel was present. They received these papers back in Raleigh; they were not transmitted to the Clerk of Perquimans Court, but to the counsel in Wake, where they had a transcript made out for the Supreme Court by the counsel, agreed to and signed by them and hurried off to the county of Perquimans, where it arrived five days after, with the judgment signed, with the transcript made out for the Supreme Court and agreed to, and with directions to hurry the record. There was nothing for him to do but hurry the record back to the Supreme Court. It came back to the Supreme Court." * * *

Mr. BYNUM: "I submit that this is not a proper argument to make. He is making in his speech now and putting before this Court the identical evidence to which we interposed objection. I submit that this is not fair to our clients. It is not treating them with the justice they expect to receive at the hands of this Court. We object."

Mr. WATSON: "I am answering the question he made. I am stating what the transcript showed."

The PRESIDENT: "I understand the counsel are not objecting to the transcript but to the conversation."

Mr. BYNUM: "Our objection is to what transpired between counsel and Judge Starbuck. They are responsible only for the decision of the case as it came before them."

Mr. WATSON: "What I intended to do was to exhibit this record to him. I have asked him if the judgment was not signed by Judge Starbuck and returned to him. I now propose to ask him as to a certain letter he wrote to the Clerk of Perquimans County enclosing the papers, and in the papers was the transcript that came to the Supreme Court. The objection to them is upon the ground that the Supreme Court is not responsible for anything that did not appear in the transcript. Then I was attempting to show what was in the transcript."

The PRESIDENT: "I am of the opinion that the transcript is competent evidence."

Mr. WATSON: (Hands witness a paper.) Q. See if this is your letter to the Clerk of the Superior Court of Perquimans County? A. It is.

Cross-Examination.

By Mr. C. M. COOKE:

Q. At the time the case agreed was made up, you say Mr. C. A. Cooke was not in Raleigh? A. Not when the facts were agreed to. This is my recollection. Mr. Busbee and I only conferred about them.

Q. That statement of facts was made by yourself and Mr. Busbee? A. Yes.

Q. I will examine you in regard to what occurred in respect to the issuing of the mandamus after the decision of the Court: You say you first went to see the Court after they assembled in Fall Term? A. Yes.

Q. For the purpose of procuring a direction from them to the Clerk to issue the writ of mandamus? A. Yes.

Q. Why did you delay so long asking for this writ?

(Objection.)

Mr. COOKE: "I take it that the Honorable Chairman of the Board of Managers, who presented the case to the Senate yesterday, laid down the lines upon which the battle will be fought. He made much of the fact there was a delay during the vacation of the Court on the part of the plaintiff in procuring the writ of mandamus to issue from the Clerk to which he was entitled. If any unfavorable inference is to be drawn from that, I submit that Mr. Harris ought to be allowed to state why he did not apply for it, and this is upon cross-examination. It is not a question of intention, but what was in the way of his getting it. I will put it that way."

Q. I understand the judgment upon the appeal was rendered on the 22d of May? A. I do not recollect the date.

Q. What was in the way of your moving for the mandamus against the Auditor at once? A. There was this serious obstacle in the way: The Court had defined in its opinion the manner in which the accounts should be made out. Mr. White was at that time in the discharge of the duties of Shell-Fish Commissioner, and it took time to get to him and back, and I had sent the accounts made out one time under the direction of Governor Russell, but when they came back he called Mr. Busbee in, and they decided the accounts were not in accordance with the decision of the Supreme Court. It had probably taken two months to get them. They had to go back again, and they did not reach me until a few days or a day or two before I made the first application to the Court for the writ.

Q. When you went before the Court the first time, which you say was shortly after its assembling in September, what members of the Court were present—a full bench? A. When I addressed the Court all were there.

Q. When you made the first motion before them that they should direct the Clerk to issue the writ of mandamus, did not the Chief Justice say to you then—either Chief Justice Faircloth or Justice Furches—speaking for the Court, "there is nothing before this Court. The case has been disposed of, and you will have to give notice to the opposite party first"? A. Yes; I think so.

Q. And that it would have to appear that the Clerk of the Supreme Court had refused to issue the writ of mandamus or they would not hear it? A. They did not say anything about the Clerk having to refuse.

Q. You say the next time you went before them, either Chief Justice Faircloth or Judge Furches asked whether or not you had made any affidavit? A. Yes.

Q. And they said there was nothing before them, and

they could not, as a Court, hear the motion; is that so? A. I do not remember they said they could not as a Court hear the motion, but the plain intimation was that they would not hear it, as there was nothing in writing before the Court. I was asked if I had prepared an affidavit or would present one.

Q. I ask you if Judge Montgomery did not tell you there is nothing for the Court to act upon; the case has been decided and you will have to go to the Clerk about that matter? A. Yes; I think he said that.

Q. At the time you made both these applications, when the objection was made first that you had not given notice and then that you had not made affidavit, and when Judge Montgomery told you there was nothing before the Court, and you would have to go to the Clerk, was there a full Court present; did any one, Judge Clark, Furches, Faircloth, Montgomery, or anyone make objection to what was said? A. I heard none.

Q. I desire to ask you this question: Did the counsel for the Auditor and Treasurer state to the Supreme Court on his opening argument that it was the object of the Auditor and Treasurer to obtain the opinion and construction of the Court as to their duties in regard to the payment of White's salary; whether he was entitled to it or not; that they wished to protect the Treasurer, as it was their duty to do, but not interpose any fractious opposition to the payment of his salary if he was entitled to it? A. Yes; that in substance was said by Mr. Busbee to the Court.

Q. Did you ever have any conversation with either one of these respondents touching this litigation? A. I never had any talk with Judge Furches at all except on the bench, and only with Judge Douglas on the occasion I have mentioned in the capitol.

Q. Did you have any letter from them, or either one of them, in reference to this matter? A. I did not.

Q. In the last application you made to the Court, after the remark of Judge Montgomery referring you to the Clerk, you applied to the Clerk? A. I did; and he asked me to put the request in writing, which I did.

Q. That was shortly before you went to Washington? A. Yes.

Q. When you came back the writ had been issued and served. A. Yes.

Q. That is all you know about the course of things? A. Yes, that is all.

Q. Long after the filing of the written application, did you not file with Colonel Kenan the form of the writ you thought you were entitled to? A. Yes, I did.

Re-Direct Examination.

Q. Did the counsel for the Auditor and Treasurer state to the Supreme Court on his opening argument that it was the object of the Auditor and Treasurer to obtain the opinion and construction of the Court as to their duties in regard to the payment of White's salary, whether he was entitled to it or not; that they wished to protect the Treasurer, as it was their duty to do, but not to interpose any fractious opposition to the payment of his salary if under the law he was entitled to it; you say counsel made that statement in his argument? A. I think Mr. Busbee stated that in his argument.

Q. It was not much of a fight? A. The main question was the amount due White.

Q. You say you then went before the Clerk and asked him to issue the writ? A. Yes.

Q. And he refused? A. I can not say he refused. He asked me to put the request in writing.

Q. He did not issue the writ? A. No.

Q. Did you ever hear that long question before you came here? A. No.

Q. Did you ever see it? A. No.

Q. Did you know it would be asked? A. No. I remember I was contending for the amount I was entitled to—$900.

Q. Then you used the argument in the case agreed made in December, 1899? A. No; that was White against Hill.

Q. Did you not argue the case on the 18th of December, 1899? A. I have forgotten.

Q. You argued it a few days after you docketed it? A. Yes.

Q. You and Mr. Busbee went before the Court as soon as the transcript was received and moved to have the case advanced; the First District had been called, and in the ordinary course the case would not have been called until Fall? A. Yes, that's right.

Q. You wanted a speedy hearing? A. Yes, I did.

Q. This is the argument Mr. Busbee made: That he wanted to protect the Treasurer? A. As I understood, there was no objection except as to the amount. The original act specified nine hundred a year. Mr. Busbee contended that, under the Act of 1899, the salary was four hundred; that was the contention between us. He did not say that White was entitled to nothing at all.

Q. There was no fight on the merits at all? A. There was no opposition on the part of the defendant that he was entitled to something; the only question was the amount.

Q. Was there any objection to the issuance of the writ of peremptory mandamus? A. It was not mentioned at all in the course of the argument.

Q. It was then the submission of the case agreed as to law and facts? A. The case agreed will show as to that.

Q. The real trouble came up on the *advisari?* A. The facts having stated that the money was in the Treasury as a special fund for the payment of this man's salary, I was entitled to the writ of mandamus.

Q. Did Mr. Busbee consent to advancing the case in the Supreme Court? A. I think so.

Q. The First District had been called and the Twelfth had been called, and it was nearly Christmas? A. It was late.

Q. Do you know if the Attorney-General appeared for the State? A. I do not. I think not.

Q. Don't you know his name was entered and erased? A. No.

Q. He was notified to your knowledge? A. I did not know him as an adversary.

Q. You were asked awhile ago if the Court did not say to you when you went in the first day that there was nothing before the Court, and that the case had already been tried and that you had nothing to do but go to the Clerk and get the writ? A. Not the first day.

Q. Was it ever so stated to you? A. I recollect that Judge Montgomery said something to the effect that all I had to do was to apply to the Clerk. I had had no talk with Judge Montgomery about it; he had dissented, and I supposed he was opposed to issuing the writ.

Q. You never heard him say anything to the contrary from the bench? A. He only said he thought I ought to apply to the Clerk.

Q. Do I understand you to say that Judge Montgomery told you to apply to the Clerk? A. I think he said from the bench that my course was to apply to the Clerk.

Q. What did the others say? A. The first day I was asked immediately if I had served notice on the other side, to which I replied No. They said they would not hear the motion; then I got Mr. Cooke up here, and he accepted service.

Q. Mr. Cooke sat in his chair and you told what you and Cooke had agreed to? A. I think so.

Q. He never opened his mouth, did he? A. I think not.

Q. Then they raised the objection that you had filed no affidavit? A. Yes.

Mr. COOKE: "I thought the counsel would stop, but I now fear he will not stop putting leading questions to the witness, and he is cross-examining his own witness."

Mr. WATSON: "I think I ought to be allowed to lead the witness a little. He never needed any leading when the counsel for the respondents was examining him. He was one of the counsel in the case, and I do not think I ought to be held strictly to the rules in my cross-examination."

Mr. PRESIDENT: "I think the question is improper."

The witness will stand aside.

E. V. PERRY, *a witness called on behalf of the Managers, being duly sworn, testifies as follows:*

By Mr. GUTHRIE:

Q. What is your name? A. E. V. Perry.

Q. Where do you reside? A. In Hertford, Perquimans County.

Q. Hertford, Perquimans County? A. Yes, sir.

Q. What office do you hold? A. Clerk of the Superior Court.

Q. When were you inducted into office? A. In 1898.

Q. And you are still in office? A. Yes, sir.

Q. State that again; when were you elected? A. In 1898.

Q. And you are still serving as Clerk of the Superior Court? A. Yes, sir.

Q. Mr. Perry, what Courts were held in your county in the fall of 1899? A. Fall Court.

Q. What Monday? A. September, fourth Monday.

Q. One week or two weeks? A. One week.

Q. When was the next Court held in your county? A. The fourth Monday in November, 1900.

Q. So there was no term, either regular or extra, from September, 1899, until November, 1900? A. No.

Q. Who held the Court in your county in September, 1899? A. Judge Starbuck.

Q. He was riding the circuit in that district in the fall of that year? A. Yes.

Q. The number of your District is the First? A. Yes.

Q. Mr. Perry, will you look at these papers and tell us what they are? A. This is the case agreed against Theophilus White and State Treasurer Worth.

Q. Have you any other paper agreed? A. Yes, sir; here is the judgment, and here is the opinion of the Supreme Court.

Q. State what term of the Court? A. Supreme Court, February Term, 1900.

Q. Any other papers connected with the case? A. Yes; the judgment of the Supreme Court.

Q. What is the date of it? A. February Term, 1900.

Q. Any other papers there connected with the case? A. That is all.

Q. Is there a letter there? A. Yes.

Q. What date is it? A. December 5, 1899.

Q. From whom? (Objections by Mr. Cooke.) A. It is from Harris.

Q. It is a letter from Harris to whom? A. To myself.

Q. Mr. Perry, when did you receive those papers? A. On December 6th.

Q. Are those the original papers in your office? A. Yes. I brought them here from my office, where they were filed.

Q. So you tell the Court that those papers are the original papers in your office? A. Yes.

Q. And among them is a letter? A. Yes.

Q. Had you ever seen those papers before Mr. Harris arrived at your office? A. No.

Q. Had you ever docketed those papers before?

Mr. BYNUM: "We object to anything that happened in the county of Perquimans in this matter. We can not be held responsible. I do not see the pertinence of this testimony."

Mr. GUTHRIE: "May it please the Court, in order that we may make our position clear to the Court, our contention is that this whole matter was irregular and void from the very beginning. Our contention is that it was a violation of the State law to submit a case agreed with reference to a mandamus writ. Our contention is that this statement of facts in the case agreed was never sworn to by anybody, and the statute requires it to be sworn to. Our contention is that the Court was put upon notice when that case came up here by appeal that it was a case where the Court below had no jurisdiction. In order that we may make ourselves clear about this matter, we say that this is not a case which could be submitted, whether in good faith or bad faith, to the adjudication of the Court, neither the Superior Court nor the Supreme Court. In order to make our contention clear, I will read the section of The Code that is referred to in the opinion of the Court, as being the section under which this case agreed was submitted in the Court below: (Section 567 of The Code is quoted.)

Senator HENDERSON: "I will ask that they be a little more quiet in the Senate Chamber, and I will ask the counsel to read the section clearly, so that we can understand what the section is."

Mr. GUTHRIE: "Thank you, I will endeavor to do so. (Sec. 567 is re-read.) (Sec. 568 is next read.)

Mr. GUTHRIE: "That is all there is in the subject, and it is historically true that this section of The Code is true. I read now Section 622 of The Code. It is a chapter by itself, entitled '*Mandamus*,' and which was passed

1871-72, and, as we contend, was passed for a purpose. Prior to that time the mandamus writs were often sought for in courts, and to regulate the practice and prescribe how a mandamus writ might be asked for and obtained, this section was passed. Section 622, page 245, First Volume of The Code: *'Application for writs of mandamus.'* 'An application for writs of mandamus shall be made by summons and complaint, and the complaint shall be duly verified.'

"I call the attention of the Court to the fact that this complaint never was verified by anybody. The parties themselves never swore that it was a real controversy. All three of them were sworn to before Mr. Cade, Notary Public. I read again: 'An application for writs of mandamus shall be made by summons and complaint, and the complaint shall be duly verified.' Our contention is that when this case agreed came before the Supreme Court, the Court was put upon notice that this statute had not been complied with. It was the duty of the Court to have inquired into it, if the Court was going to try it at all or hear the case upon appeal. I read the next section of this Code on the subject of mandamus. (Section 623 is read.) If a mandamus writ is issued, the summons must be returnable to the term of the Court and the complaint must be verified. May it please the Court, our contention is that this whole proceeding was void from the very beginning of it. The Court is presumed to know that this is not a case returnable to Court at term time; that this was a case heard in the city of Raleigh, and the papers sent to the Clerk of the Court at Hertford, in Perquimans County, and the Clerk tells us now that he never heard anything about this case until judgment was signed and sent to him by letter, and I think we ought to be permitted to read the letter, with permission of the Court."

The PRESIDENT: "Will not the record itself show these irregularities?"

Mr. GUTHRIE: "The record shows that upon its face."

The PRESIDENT: "Is there anything else outside of the record?"

Mr. GUTHRIE: "I also want to say another thing. Mr. Harris was not making up the testimony to send to the Supreme Court. This is in violation of the positive statutes regulating this proceeding, and we allege that in this subdivision in Article IV, that the aforesaid mandamus writs were directed to be issued as aforesaid, in wilful disregard of the statutory provision relating to the application for writs of mandamus. Of course we contend, in addition to all this, that the Supreme Court sitting as an Appellate Court had no jurisdiction. That when it appeared to the Court that this case had been heard in Perquimans Court, that the Court could not acquire jurisdiction by appeal. We offer this evidence."

Mr. F. H. BUSBEE: "I don't know where to begin to reply to that portion of my friend's address where he discusses the evidence upon its merit. His contention is that the Supreme Court has no jurisdiction to hear an action of mandamus upon a case agreed; that, as stated, prescribes a certified complaint must be filed; there is no jurisdiction in the Supreme Court to hear such upon appeal. And he cites authority which he thinks sustains that position. I suppose, Mr. President, as there has been only fourteen lawyers upon that side, they have not had time to examine the cases in the Court upon that subject. If they had only taken the case of *Bank v. Worth,* they would have found that it did not make the point that these gentlemen rely upon. They would have found, with the very slightest reference to the authority in the case of *Bank v. Worth,* 117 N. C., 146, that it was a petition of mandamus. No one before had ever thought of making this point. That opinion was filed by the Justice who dissents in the case of *White v. Auditor.* The same

thing occurs in *Purnell v. Worth*. No lawyer in North Carolina ever before thought it could not be done. There is not a lawyer in the Senate that does not know that an action for mandamus is not now a high prerogative writ, but an ordinary form of sufficient action. It can only be obtained by an order, usually to a municipal corporation, against an officer. He is qualified, of course, by the law in reference to controversies in cases agreed when affidavit is made in the very form prescribed by statute, but it can not appear by affidavit that the controversy is real. That is the way the law says it must be sworn to, yet our friends say that the Judges must be impeached when the controversy is real and in good faith. They had the authority of *Banks v. Worth*. Who would you think represented the defendant in that case? It was the very distinguished lawyer, whose reputation spreads beyond the borders of this State—Mr. W. A. Guthrie. He was representing Worth at that time. "That you can not submit a mandamus upon a case agreed," using that very expression, backed up by fourteen lawyers. Now, so far as that view is concerned, Mr. President, why everybody knows that unless objection is taken to the county where proceedings are filed, it is the law to take them. A man has a right to take it to the proper Court. But, Mr. President, everything which appears in the transcript concerning the verification is proven in the transcript, but nothing which was not before the Court—nothing which was not before the respondents in the transcript—can be introduced here. Would it not be monstrous to say that if a letter was wrtiten by any counsel to a Clerk of the Court, and that letter contained anything out of the regular Court, that that letter was competent to say that the respondents had knowledge of it. Surely the counsel, when he said that when a case had any irregularity in it, that the Judges who heard it up here were bound by any irregularity which was in that

case. So that if this case is to be begun and fought this way, if law is to be trampled under foot in the very outset, it seems that my friends upon the other side have mistaken the justice of this Court."

Mr. GUTHRIE: "If the gentleman will lend me his book I will be very much obliged to him. Mr. President, I suppose it would be proper for me to rise to a question of personal privilege. That one of the counsel for the Managers had been counsel for the Treasurer in this case. Now, Mr. President, I would like to say in reply to the gentleman, with reference to the counsel, that it is the Court that is responsible for its position and not the attorneys who appear before the Court and argue cases. It has never been my good fortune to hold a judicial office, but I think, Mr. President, if I should receive such honors at the hands of the people, I would never try to hide myself, even in a case of Impeachment, by trying to put the blame on the counsel who argued the cases. This was an effort to protect the State by claims that grew out of the Hoola Boom investigation of the Arrington claim. I don't think I ought to be reproached; those claims have never been paid. I am trying to hold the pocket of the Treasurer against such claims, and if I am to be reproached for any position I took in that case, I am willing to bear that reproach as counsel. Brother Busbee, I hope that will not make the Managers scared. Before we get through, we will see, may it please the Court, whether these respondents can hide behind the shades of Ruffin and escape responsibility to the people. This case does not involve a discussion as to the process of mandamus. This was a case agreed, and this was a case where there never was any mandamus issued."

Mr. BUSBEE: "I beg your pardon, sir. A mandamus writ was issued by Judge Coble."

Mr. GUTHRIE: "To show how regular the case of *Bank*

v. Worth was compared with this, on page 47 it sets out that it was a petition of mandamus heard before Judge Coble upon a case agreed, but it was a petition to the Judge and the case shows it was brought up in that way. This was a case agreed, and not a controversy submitted without action. It is a case where the parties agreed upon the facts and the plaintiff petitioned Judge Coble to grant a mandamus writ. Petition for mandamus heard before Judge Coble, upon a case agreed, referring to above-entitled action, and that of *T. R. Purnell v. W. H. Worth.* In that case the Auditor had drawn his warrant and the Treasurer refused to pay it, and the Court held, and held properly, that the Treasurer ought not to have paid those warrants."

Senator HENDERSON: "May I be permitted to ask a question of the counsel? I just wanted to know for the benefit of the Senate whether it appears from the record that the petition for the mandamus was verified or not."

Mr. C. M. BUSBEE: "It does not appear. We find that it is a very different thing entirely; the action is duly brought and a verified petition, as this is assumed to be is a case agreed. The only thing is that the facts are agreed upon and submitted to the Court, upon the due institution of the Court, by a summons and verified petition. You will note in section 1622 of The Code, that an action of mandamus shall commence by a summons and verified complaint, and whether the record shows upon its face that there has been no summons, it possibly might be waived as to whether there has been no summons at all. Then we say, and we shall contend that the Court ought to have seen upon the face of the record that there was no jurisdiction in the Court to hear the case. If that is so, the material distinction is in the case agreed and submitted without action. Section 622 of The Code requires that the complaint shall be verified. All applications for writs of mandamus shall be made by summons

and complaint, and the complaint shall be duly verified. Instead of the complaint, an action for mandamus may be submitted in the form of a controversy, submitted without action, but when counsel see fit to submit to the Court, it must necessarily be placed upon a verified controversy if you submit it without action. We say, Mr. President, that the fact was admitted in that controversy that the Treasurer then had funds in his hands. This statement was not true in fact, and that perhaps was the reason why they would not swear to the truth of it. That is to say—I can not emphasize it more strongly than by repeating it—that the law never intended, and the State of North Carolina never justified, an action, the result of which would be to open the doors of the Treasury."

Mr. BYNUM: "It seems to me that this discussion is drifting away from the case. I desire to suggest to my brother Busbee, who has just taken his seat, that inasmuch as he has conceded in his argument that a proceeding for mandamus may be instituted and applied for upon the case agreed, then if it is done upon the case agreed, there is no complaint.

"I am not referring to what is said in the case of *Bank v. Worth*. I understand the counsel to say that in an application for mandamus, it is a proper proceeding in such cases to make the application upon case agreed."

Mr. C. M. BUSBEE: "I never used the words 'case agreed.' But concede for the purpose of this action that the summons and complaint might possibly be waived, provided the facts alleged in the controversy without action were duly verified?"

Mr. BYNUM: "I misunderstood the gentleman. In any event, an application for mandamus is in the nature of a sufficient action. If that be true, it must be apparent to every member of this bar who is a lawyer that there is no

complaint to be verified. If there is no complaint it would be perfectly useless to swear to a case agreed, because there is no controversy. The record in this case shows that the affidavit is that required to be made by the statute. Our objection goes to the point that it is irrelevant and not competent in this trial."

The PRESIDENT: "If there was any conversation which took place between Judge Starbuck and the counsel, it would not be competent evidence until you connected the defendant with it."

Mr. GUTHRIE: "The witness will stand aside."

Senator HENDERSON: "I would like to ask, for the information of the Senators, whether we are going to find upon our desks to-morrow morning everything that has been said here, and everything that has been introduced."

The PRESIDENT: "The rules order that it be printed."

Mr. GUTHRIE: "We would like to call Mr. Perry again."

E. V. PERRY—*Recalled.*

Mr. GUTHRIE: Q. After the opinion of the Supreme Court was certified to you did you issue any mandamus writ? A. No, sir. It was not applied for.

Mr. GUTHRIE: "That is all that we wanted to ask the witness."

The PRESIDENT: "The witness asks to be excused in order that he may go home. He has a court next week."

Mr. GUTHRIE: "That is all right, we are through with him."

Mr. C. M. BUSBEE: "Here is the record that was admitted."

(Objection is made.)

Mr. OSBORNE: "May it please your Honor, we understood that was simply to identify the papers and not to

offer them in evidence. We object to it on the same grounds that we objected to the Harris letter. We are maintaining as well as we know how to maintain, that these Judges can not be held responsible except for what was before them. If the gentlemen offer it now, we object to it."

Mr. GUTHRIE: "We offer the records."

The PRESIDENT: "This record came up from what Court?"

Mr. GUTHRIE: "From Perquimans Court. We offer now the record itself in the case of *White v. The Auditor* in Perquimans Court."

Mr. OSBORNE: "Your Honor understands our objection? That the paper has never been inside of the Supreme Court, and the Judges know nothing about them."

The PRESIDENT: "It would have no effect until it was brought to their knowledge."

Mr. GUTHRIE: "The transcript from the Supreme Court has been read in evidence. We offer that as part of the same case."

The PRESIDENT: "Now you want to offer the record in the Perquimans Court."

Mr. GUTHRIE: "Yes. Now we offer the original papers in the Court below."

The PRESIDENT: "These are the original papers; does the transcript which you have already offered include this?"

Mr. GUTHRIE: "I think not. It does not include all of the judgment."

The PRESIDENT: "Why would not the transcript from the Supreme Court to the Superior Court show that evidence?"

Mr. JARVIS: "I humbly submit that if you went to show any judgment from this Court to the Court below you would show it by the records of the Supreme Court."

Mr. C. M. BUSBEE: "We can only show that by the original judgment certified down below, and which constitutes a part of this record of the Superior Court. And for that purpose we offer this in evidence."

Mr. OSBORNE: "I do not want to worry the Court, and I shall take my seat in a minute. Now, may it please your Honor, I don't see why we should be drifting away from the point of issue. What evidence is he offering there?"

Mr. Manager ALLEN: "It seems to me, Mr. President, that there is one paper in this record that we are clearly entitled to offer in evidence, and that is the judgment that was sent to the Court below, because that is the act of the Supreme Court. I think we are entitled to the whole of the record, for the purpose of showing that no writ was issued form the Court below, and that no application for writ was made. Now, if the counsel upon the other side agree that there was no writ issued, then we do not want to offer it. I think it is competent, and it strikes me that it is fair."

Mr. GUTHRIE: "It recites the fact that a judgment was entered in the Supreme Court. I understand there is no objection offered by them."

Mr. OSBORNE: "No, sir. Do we understand the Court to rule thus?"

The PRESIDENT: "I am going to rule it out. Pass it up. I am of the opinion that a transcript from the Superior Court of Perquimans County to the Supreme Court of Appeal should be a complete record, and that would be the only record that would affect the defendants in this case."

Mr. C. M. BUSBEE: "We think your Honor is entirely right in that respect. The judgment is not objected to."

The record is ordered put in by the President.

EXHIBIT "F."

JUDGMENT.

NORTH CAROLINA—Perquimans County.
SUPREME COURT, February Term, 1900.

Theophilus White
against
Auditor and Treasurer of North Carolina.

This cause came on to be argued upon the transcript of the record from the Superior Court of Perquimans County, upon consideration whereof this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable D. M. Furches, Justice, be certified to the said Superior Court, to the intent that its judgment be modified and affirmed, and that judgment be entered in this Court as directed in said opinion. And it is considered and adjudged further, that the defendants do pay the costs of the appeal in this Court incurred, to-wit: the sum of twelve and ten one hundredths dollars ($12.10), and let execution issue therefor.

THOS. S. KENAN,
Clerk of the Supreme Court.

A true copy.

NORTH CAROLINA—Perquimans County.
SUPREME COURT, February Term, 1900.

Theophilus White
against
W. H. Worth, Treasurer, and H. W. Ayer, Auditor, Appellants.

F. H. Fusbee and *Cook & Green*, for appellants.
J. C. L. Harris, for appellee.

FURCHES, J. This is a controversy without action under sections 567 and 568 of The Code. The facts agreed, upon which the judgment of the Court is asked, are as follows:

The General Assembly of North Carolina in 1897 passed an act to provide for and promote the oyster industry of North Carolina, ratified February 23, 1897, being chapter 13 of the Laws of 1897. This act is made a part of the case.

That on the 23d day of February, 1897, the plaintiff was duly appointed by the Governor of North Carolina, under the provisions of said act, Chief Inspector for the constitutional term of four years, and

was duly commissioned as such, and was inducted into said office and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in section 13 of the act.

The General Assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shell-fish industry of the State, ratified March 2, 1899, being chapter 19 of the Laws of 1899. Under this act, the persons named in section two (2), namely: George H. Hill, of Washington, Beaufort County; B. D. Scarboro, of Avon, Dare County; Daniel L. Roberts, of New Bern, Craven County; Robert W. Wallace, of Beaufort, Carteret County; C. C. Allen, of Elizabeth City, Pasquotank County; J. M. Clayton, of Englehard, Hyde County; and Daniel B. Hooker, of Bayboro, Pamlico County, undertook to discharge the duties of Shell-Fish Commissioners, under the claim that the Act of 1897 was repealed by the Act of 1899.

That the persons named in the preceding paragraph, having undertaken, under the title of Shell-Fish Commissioners, to discharge the duties devolving upon the plaintiff as Chief Inspector, and having taken possession of the Steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the Supreme Court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case.

That since the 15th day of March, 1899, up to November 20, 1899, the defendant H. W. Ayer, Auditor of the State, has refused to issue to the plaintiff a warrant for the sum of seventy-five dollars per month and his actual travelling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the Act of 1897; and the defendant W. H. Worth, State Treasurer, for the same period of time, has refused to pay the salary and travelling expenses of the plaintiff as Chief Inspector, and also the fifty dollars per month claimed by the deputy inspectors.

That since the opinion of the Supreme Court has been filed the plaintiff has again demanded of the Auditor the issuance of a warrant in his favor for the amount of his salary and expenses, and the same has been refused by the defendants. The defendants base their refusal upon the Acts of 1899, chapter 21, which is made a part of this controversy.

The plaintiff insists that the decision of the Supreme Court, hereinbefore mentioned in the facts agreed, that he is entitled to a salary of seventy-five dollars a month and actual travelling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chapter 21, Acts of 1899, above mentioned. He asks that a mandamus issue to the defendant, the State Auditor, requiring him to issue a warrant for the amount due him under the law, and also that a mandamus issue, directed to the State Treasurer, requiring and compelling him to pay the same, and for all further

relief which, under the facts above mentioned and the law of North Carolina, he is entitled to.

It is further agreed that no part of the compensation as provided in chapter 19, Public Laws 1899, has been paid to the persons therein named as Shell-Fish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and travelling expenses as the plaintiff may be entitled to."

Upon these facts the plaintiff contends that he is entitled to a writ of mandamus against the defendants. This contention is disputed by the defendants, and the plaintiff's right to a mandamus is denied.

It has been decided by this court that the plaintiff is entitled to hold his office of Chief Inspector, to which he was appointed in 1897, for the remainder of his term of four years. *White* v. *Hill*, 125 N. C., 194. This is settled, and the question is now presented as to whether or not he shall have pay for his services.

The plaintiff was duly appointed and inducted into his said office in March, 1897, for a term of four years, under an Act of the Legislature ratified on the 23d day of February, 1897—being chapter 13 of the Public Laws of that year. Under this Act he was entitled to a salary of $75 per month, or $900 per annum, payable monthly. This is not denied by the defendants, but they say that chapters 18, 19 and 21 of the Public Laws of 1899 had the effect to destroy the plaintiff's right to pay. They say that chapter 18 repeals section 13 of the Act of 1897, and this is true; and they say that chapter 21 prohibits them from paying a salary to any one not acting under chapter 19 of said Act; and it is true that this Act so provides. And the defendants say that the plaintiff is not acting under the Act, chapter 19, and is not entitled to any pay for his services. But, as it is seen that the plaintiff's office to which he was appointed in 1897, still exists, and that he is entitled to hold the same and perform its duties, it would seem that he is entitled to receive the salary attached thereto.

The Legislature may abolish a legislative office, and this is the end of it. *White* v. *Hill*, *supra; Hoke* v. *Henderson*, 15 N. C., 1. When the office is abolished, this ends the term of the officer holding it, as there can be no officer without an office, and of course no salary without an officer.

The Legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent and to starve him out. But if it clearly appears that it was done for that purpose, it would be void. *Bunting* v. *Gales*, 77 N. C., 283; *Hoke* v. *Henderson*, *supra*. In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. *Hoke* v. *Henderson*, *supra*.

But if the Legislatnre should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent would so plainly appear that the Act would be declared void. *Hoke* v. *Henderson, supra; Cotten* v. *Ellis*, 52 N. C., 545.

The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may he passed and in force, during his term of office.

The Legislature, on the 28th day of February, 1899, passed an Act expressly amendatory of chapter 13, Laws 1897—this being the Act under which the plaintiff was appointed. And on the 2d day of March, two days thereafter, it passed another Act upon the subject of oysters and shell-fish. This Act does not state that it is an amendment of the former Acts, nor does it purport to repeal the previous legislation on the subject of oysters and shell-fish, except so far as they are in conflict with the Act of the 2d of March, 1899, and on the 8th of March, 1899, it passed chapter 21, which is stated to be "supplemental to chapter 19 passed on the 2d of March." This last Act prohibits the Treasurer from paying any compensation claimed for services, unless the person so claiming them shall be authorized to render such services under chapter 19, of which Act this Act is a supplement.

The Legislature having general powers of legislation, all these Acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff. (We say the constitutional rights of the plaintiff for the reason that his rights alone are before us for our consideration.)

It is, then, the duty of the plaintiff to administer his office under the law as it now exists; that is, under the Act of 1897, as modified and changed by the Legislature of 1899, chapter 18, and chapter 19 of the Public Laws of 1899.

For the purposes of this action it is not necessary for us to decide whether chapters 18 and 19, Laws of 1899, were intended as amendments of the Act of 1897 or not. They are both a part of the Public Laws of the State, and must be observed when not in conflict with the plaintiff's vested rights. Chapter 18 is expressly stated to be an amendment to the Act of 1897; and chapter 19 does not state whether it is an amendment or not. But both Acts are on the same subject and must be considered together and treated as amendments. And where they expressly repeal the former Act, or are in conflict with its provisions, the provisions of the latter Act must prevail, unless they are in conflict with vested rights. It is so held in *White* v. *Hill*, *supra*, which is expressly put on *Abbott* v. *Beddingfield*, 125 N. C., 256, and *McCall* v. *Webb*, *Ibid*, 243. And as the plaintiff is not only authorized to perform the duties required by chapter 19, but it is in fact his duty to do so, there can be no reason for applying the provisions of chapter 21; and it is not necessary for us to decide whether it would be valid or not, if it were necessary for us to decide that question.

The fact that the Legislature of 1899 changed the name of "An Act to promote the oyster industry of North Carolina" to that of "Shell-Fish Commissioners" did not abolish the plaintiff's office. *White* v. *Hill* and *Abbott* v. *Beddingfield, supra; Wood* v. *Bellamy*, 120 N. C., 212. Nor does the fact that the Act of 1889 changed the name of the plaintiff's office from that of "Chief Inspector" to that of "Chairman of the Shell-Fish Commission" oust the plaintiff from his office or deprive him of his salary. *Wood* v. *Bellamy* and *Abbott* v. *Beddingfield, supra.*

The plaintiff being entitled to his office and to the salary attached thereto, what is his salary under the legislation as it now exists, and how is he to get it?

Under chapter 19 of the Act of 1899 it seems to us that it has been reduced to $400 per annum and five cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum. We can not say that this reduction was not made for the public benefit, and we have no power to change it and no disposition to do so if we had. The reduction may be made. *Gales* v. *Bunting* and *Hoke* v. *Henderson, supra; White* v. *Murray*, at this term.

Then what is necessary to be done to enable the plaintiff to draw his salary? The Act of 1897 did not give specific directions as to this. The Act of 1899, chapter 19, section 9, provides that this shall be done upon the warrant of the Auditor, "which warrant shall be issued by the Auditor upon the certificate of the secretary of the said board, and countersigned by the chairman of the Shell-Fish Commission." This was only a matter of detail, which seems to have been proper to supply a defect in the Act of 1897, and was passed when it was thought that Hill and his force would be in office. And we can not, and do not, construe this paragraph to mean that the incumbent should not receive any salary for his services. This, in our opinion, would be to construe the Act to mean what we think the Legislature could not do; *Otten* v. *Ellis, supra;* and it would also be to construe it to mean what it does not say, and what we do not think the Legislature intended it to mean.

So, if this direction as to the manner of issuing the warrant can not be literally complied with—*in hic verbis*—it should be complied with "as near as may be." That is, the certificate should be issued by the clerk of the present board and countersigned by the plaintiff, who is acting as chairman in place of Hill, and the Auditor's warrant should issue upon this certificate.

This opinion might close here, and would do so, but for the arguments urged in opposition to the views we have expressed, some of which it seems to us should be noticed.

It is said that chapter 19 names certain persons as commissioners, and that the plaintiff is not one of those named in the Act. This is true. But the act does not provide that the salary shall be paid to these parties, *eo nomine*, but to the commissioners performing the duties pre-

scribed by the Act. Suppose any or all of the commissioners named in chapter 19 had died or resigned, is it contended that still they should receive the salary, or that the work should stop and the commission fall through and fail on that account? They are out, and, so far as we know, are not claiming any pay.

It was said this court had no jurisdiction of this matter; that it only has appellate jurisdiction; that the assumption of such jurisdiction is unheard of; that the judgment of the court will be *ultra vires* – unlawful, unconstitutional and void—and that the *Legislature* may declare it unconstitutional; and if it should do so, and the Treasurer should obey the judgment of this court, he might be in danger. This argument seems to proceed upon the idea that this proceeding was commenced in this court, whereas the record shows that it is here on appeal from the Superior Court of Pasquotank County. And it would seem that the slightest examination would have shown that it is not a proceeding unheard of before.

In *Marbury* v. *Madison*, 1 Cranch, 49, which was mandamus against James Madison, Secretary of the United States, it was held that the action would lie.

In *Cotten* v. *Ellis*, 52 N. C. 545, which was a proceeding in mandamus by Cotten, claiming a *salary* as Adjutant-General of North Carolina, against John W. Ellis, Governor of North Carolina, it was held that the action would lie, and the writ was issued.

But a more recent case is that of *Granville County Board of Education* v. *State Board of Education*, 106 N. C., 81, in which it was held that the action would lie, and the writ was granted. The opinion of the court in that case was written by Justice Clark, and seems to be a direct authority for issuing the writ in this case.

The opinion in *Cotten* v. *Ellis supra*, is not only authority for granting the writ, but it would be well to note what the court says, near the close of the opinion, with regard to the execution of the writ, which is in these words: "We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question." The opinion (*Cotten* v. *Ellis*) also contains this language: "A statute which *reduces* a salary during the term of office, and one which *takes away the salary altogether*, stand on different footings, for in the latter case, the object would evidently be to starve the incumbent out of his office, and thereby do indirectly what could not be done directly, so as to make applicable the remarks made in the case of *Hoke* v. *Henderson*, in which there seems to be much force, that such indirect legislation is as obnoxious to the charge of being unconstitutional as an Act directly depriving one of his office. A proper construction of the statute does not lead to the inference that it was the intention to abolish the salary,

in the event that the applicant still continued entitled to the office and liable for the discharge of its duties. On the contrary, the clause which repeals so much of the 9th Section, as relates to the salary, is a mere corrollary or incident to the clause which repeals so much of that section as relates to the appointment of the Adjutant General, and consequently the one cannot, by any rule of construction, be made to extend in its operation further than the other." To hold otherwise, the court says, 'would be to place the legislature in this attitude—We mean to abolish the office: if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary."

The facts in *Cotten* v. *Ellis* are so nearly the same as the facts in this case, is our excuse for quoting so much of the opinion.

Before the suggestion that the *Legislature may declare the opinion of this court unconstitutional*, may be adopted by anyone, we ask them to read the opinion of Chief Justice Marshall in the case of *Marbury* v. *Madison, supra.* It is a full and complete answer to this suggestion. We would like to incorporate the whole of that opinion in the opinion of the court in this case; but as this is impossible, we will again have to ask to be pardoned for making some quotations from this very able opinion, emanating from the mind of probably the greatest jurist this country has produced. It fully sustains the doctrine of *Hoke* v. *Henderson*, 15 N. C., 1, that an office is property—a vested right—of which he cannot be deprived. It discusses the relation of the government to the citizen, the supremacy of the Constitution over ordinary legislative acts, the relation of the Executive, Legislative and Judicial Departments of the Government, and shows that all three of these departments are equally bound by the Constitution, but within their own departments; that, while it is the exclusive right of the Legislative Department to enact laws and the duty of the Executive to enforce them, it is the exclusive right of the judiciary to construe them and to say whether they are repugnant to the Constitution or not. The idea that the Executive or the Legislative Department has any right to put a different construction on a statute or a different construction on the Constitution than the court has, is utterly repudiated. On page 59 (1 Cranch) it is said: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights." And on page 61 it is said: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the law of his country for a remedy."

On page 62. "The question whether a right has vested or not is in its nature judicial and must be tried by the judicial authority."

On page 64: "What is there in the exalted station of the officer, which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but upon particular acts of Congress and the general principles of law?"

On page 66: "The doctrine therefore now advanced *is by no means a novel one.*"

On page 67: "If Congress remains at liberty to give this court appellate jurisdiction, when the Constitution has declared their jurisdiction shall be original, and original jurisdiction when the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance."

On page 69: "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people to limit a power in its own nature illimitable . . . . If an act of the Legislature, repugnant to the Constitution, is void, does it not withstanding its invalidity, bind the court and oblige them to give it effect? Or in other words, though it be no law, does it constitute a rule as operative as if it was a law?"

On page 70: "It is *emphatically the province and duty of the Judiciary to say what the law is,* (the italics are ours) . . . . So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide the case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We cannot quote all of this very able and exhaustive opinion, but we trust that we have quoted sufficiently from it to establish the separate independent jurisdiction and power of courts to decide the law, and to show that neither the executive nor the legislative department has any such power.

Our opinion then is that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899 chapter 19 (and the same that Hill would have been entitled to if he had remained in office), to be paid by the Treasurer of the State out of the oyster fund appropriated by the Act of 1897 and the Act of 1899 admitted to be now in his hands; provided that the expenses of this commission do not exceed the sum of six thousand dollars, per annum, and that the certificate and warrant shall be issued in the manner we have indicated.

The judgment of the court below will be modified in conformity with

this opinion, and being so reformed, judgment will be entered in this court. Modified and affirmed.

A true copy,

THOS. S. KENAN.

[Seal of the Supreme Court of the State of North Carolina.]

S. C. C.

Senator HENDERSON: "I would like to know, for my own information, and I think every Senator would like to know the same, exactly what is ruled in and what is ruled out. As I understand it, the transcript of the record came from the Supreme Court to the Perquimans Court, then in regard to the judgment, that was sent down from the Supreme Court to the Superior Court of Perquimans County."

Mr. PRESIDENT: "That has been ruled in. Call next witness."

THOMAS S. KENAN, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination by Mr. GUTHRIE:

Mr. GUTHRIE: "Your name is Thomas S. Kenan? A. Yes."

Q. What office do you hold? A. Clerk Supreme Court of North Carolina.

Q. When did you go into office? A. In 1886.

Q. Appointed by the Court, were you? A. Yes.

Q. And you have held the appointment ever since? A. Yes.

Q. Are you put in for any particular term? A. Yes; for eight years.

Q. You first entered the office in 1886 and have been re-elected from time to time until now? A. Yes.

Q. Will you please turn to your docket of the First District and turn to the case of *White v. The Auditor* and tell us when that case reached your office? A. I will read the

entries that were made on the first docket at the time. The appeal reached here December 8, 1899; set for hearing at the end of the State cases, and it was argued on December 19, 1899. The rule of the Court is, that the State cases shall be heard first, and it was after the State cases that this case was set for hearing.

Q. At what time did the Court adjourn for December Term, 1899? A. The Supreme Court adjourned on Saturday, the 23d day of December, 1899, at 12:16 p. m.

Q. Are there any other entries on that docket? A. An adversary taken in this case at December Term, '99, after the argument.

Q. What other entries are made there? A. It was then carried to the docket of the next term.

Q. Who were counsel on that docket? A. J. C. L. Harris, F. H. Busbee, and Cook & Green, for plaintiff.

Q. Now, Colonel, turn to your docket for the next term of that Court. Now, read from your docket at the February Term, 1900. A. That case was brought over in the adversary with the same dates given as to the docketing of the appeal on the day in which it was argued. Docketed December 8, 1899, *Theophilus White v. H. W. Ayer, Auditor, and W. H. Worth, Treasurer.* It was argued December 19, 1899. Adversary was taken then and an opinion rendered May 22, 1900, by Furches, J., modified and affirmed; Douglas, J., affirming, Clark and Montgomery dissenting, and judgment heard as directed in the opinion. The same counsel appeared also in this docket. Mr. Harris and Mr. Busbee for the plaintiff, and Messrs. Cook & Green for the defendant.

Q. Did Mr. Green appear in the case? A. I don't know. That was the firm at that time at Warrenton.

Q. Have you read all that is on that docket? A. Yes; except a memorandum furnishing a copy of the judgment to Mr. Harris, October 4, 1900.

Q. You furnished him a copy October 4th, and you gave him a copy of the same thing on October 21st? A. Yes.

Q. Will you turn to your minutes and read judgment of the Court in the case of *White v. The Auditor,* page 38, of the minutes of February Term, 1900—read everything connected with it? A. *Theophilus White v. H. W. Ayer, Auditor, and W. H. Worth, Treasurer.* Perquimans Docket, December 8, 1899, argued December 19th, opinion by Furches, J., and Douglas, J., filed concurring opinion. Clark and Montgomery dissenting. Final judgment was heard in this case as follows: "It is adjudged that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899, chapter 19, to-wit, the sum of four hundred dollars per annum, and five cents per mile travelled, when engaged in his work, and extra expenses not to exceed fifty dollars per annum, and that the same be paid by the Treasurer of the State out of the oyster fund appropriated by the Act of 1897 and the Act of 1899, admitted now to be in the Treasurer's hands: *Provided,* That the expenses of the commission do not exceed the sum of six thousand dollars per annum. It is further adjudged in the opinion of the Court that the warrant shall be issued and that the defendants pay the cost of appeal. W. T. Faircloth, C. J."

Q. That was the February Term, 1900, was it? A. Yes.

Q. Did you issue any writ to enforce that judgment at any time between then and the 17th day of October following? A. I did not.

Q. When did Mr. Harris first apply to you to issue a writ? A. I don't remember the day, but it was between October 4th and October 10th. I state that because on October 4th I gave him a copy of the judgment, and it was after that day and before October 10th that he first came to me in reference to the matter. Afterwards he wrote me a letter dated on the 10th.

Q. Did he make a demand upon you to issue writ in the letter of the 10th? A. Yes.

Q. Have you got the letter? A. Yes.

Q. Will you produce it please?

Mr. GUTHRIE: "We will offer the letter in evidence. It is the original letter.

RALEIGH, N. C., *October 10, 1900.*

To the Clerk of the Supreme Court:

In the case of *Theophilus White* v. *Hal W. Ayer, State Auditor, and W. H. Worth, Treasurer*, I request that you issue immediately peremptory writ of mandamus against the defendants herein as order in the judgment of this Court.

Very respectfully, J. C. L. HARRIS.

Q. Did you issue the writ when you received that letter? A. Not immediately.

Q. Tell us what happened after that? A. When I got this letter, I delivered it and a typewritten writ of mandamus that had been left with me by the plaintiff's attorney, to Judge Faircloth, calling his attention to it in the Supreme Court room, and he returned it to me on the afternoon, I think it was the same day.

Q. Was the Court then in session? A. I think not; I don't think they had gone in session at that time.

Q. That was before they went into session? A. Yes; they were in the Supreme Court room though. He returned it to my office, I think, the same afternoon and my recollection is, that at some subsequent day he came in and asked me for those papers, and I delivered them to him and he took them with him.

Q. Where did he go? A. I suppose he went where he lived.

Q. Did he call for the papers before the morning session of the Court? A. No; afterwards. I think it was in the afternoon of the next day that I delivered the papers to him,

and he took them, I take it, to his room. The next morning, if I mistake not, I received through the messenger of the Supreme Court, who waits upon the Judges, a draft of a paper of mandamus writ, from which I drew the writs that were issued. That draft was in the handwriting of Judge Furches.

Q. What became of the one Harris had handed you before? A. That was not returned to me.

Q. You got back the form of writ in the handwriting of Judge Furches? A. Yes.

Q. Had you applied to Judge Furches for a form? A. No; I did not apply to anybody for a form of writ. That is why I wanted to state, in justice to myself, the fact that I delivered these papers to Judge Faircloth.

Q. Colonel, what I want to get at, is this: You say that the writ that Harris prepared and submitted to you, you gave to Judge Faircloth, and that was not returned to you. A. No.

Q. Judge Furches sent you form of writ by servant in his handwriting; did you ask him to furnish it to you? A. No.

Q. What we want to know, is what took place in reference to those papers. You received that form of writ in Judge Furches's handwriting; was there anything else accompanying it? A. There was a personal note endorsed on it to me. It was in Judge Furches's handwriting, as well as I remember; in that personal note to me, he stated—

(Objection made to Colonel Kenan stating contents of note. The question is withdrawn.)

Q. Now, Colonel, we want to go back to the time when you first applied to the Court for instructions in regard to issuing these writs. What occurred, where it was, who was present? A. I went into the Supreme Court while they were in conference; that was on the afternoon of Friday, the 12th.

Q. What occurred, who was there? That was before you got the copy of the writ from Judge Furches? A. No; after. I got a copy of the drafts on the morning of February 12th. On the afternoon of Friday, the 12th, I went into the Supreme Court and asked to be advised as to the duty of the Clerk.

Q. Who was present. A. All of the five Judges.

Q. State now what happened, Colonel? A. The reply to my application was not as definite as satisfied me.

Q. Please state what you said to the Court. A. I told the Court that I had an application from the plaintiff's attorney and wished to be advised as to the Clerk's duty. The responses were not so definite as to satisfy me. Judge Furches was direct and pointed in his advice to issue writ; Judge Faircloth, if I remember rightly, said that, in his opinion, as an individual Judge, it ought to be issued. Judge Douglas, if I remember correctly, stated a general proposition, in substance about as follows: That he thought unless the Courts could execute their judgments, then they would be insufficient departmnets of the government. I don't give his language, but that is the thought.

Q. What did the other two Judges say? A. I really don't remember now what they said. I say I don't remember, on my first visit, what they said. I knew that both of those Judges had filed dissenting opinions in the case, but I don't remember what they said on that occasion, on Friday afternoon, October the 12th. I don't now remember whether they said anything. I know the Judges commenced to talk about the matter, and I withdrew from the room.

Q. When you withdrew, what happened; did you then issue the writ? A. I did not.

Q. What happened after that afternoon when you left the room? A. Nothing at all in reference to this matter.

Q. When was it that Judge Clark said something to you

about it? A. Judge Clark sent me a letter with a protest, or dissenting opinion, which I received on Saturday morning, the 13th.

Q. Would you recognize it again if you were to see it? A. Yes; it is in the possession of you gentlemen.

Senator MORRISON: "I rise to a point of order. The hour of adjournment has arrived."

The PRESIDENT: "It lacks one-half a minute yet. The Court will take a recess now until 10 o'clock to-morrow, Saturday morning, March 16th."

The Sergeant-at-Arms makes due proclamation, and the Court adjourns until 10 o'clock Saturday morning, March 16th.

SEVENTH DAY.

THE SENATE CHAMBER,

Saturday, March 16, 1901.

The Court of Impeachment met pursuant to adjournment of yesterday at 10 a. m., the President presiding.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morton, Pinnix, Robeson, Scott, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard. Forty-five.

On motion of Mr. London the reading of the Journal of yesterday was dispensed with.

Mr. JARVIS: "I desire the indulgence of the Court for a few moments. In one of the morning papers I see a statement concerning which I think it proper to make a few remarks. The counsel for the respondents in this case from the beginning of the trial determined to conduct this trial upon a high and dignified plane in keeping with its great importance to the people of the State. We are not going to be swerved from that course. We are also determined, as far as in our power lies, to bring it to a speedy conclusion, if such is possible. We have thought, and still think, that the opinions of eminent lawyers of the State as to certain legal questions involved in this testimony would be competent evidence. So believing, we have had some fifteen or twenty lawyers subpœnaed. We have never contemplated going beyond that. We have written to none other than those we have subpœnaed.

We have never contemplated bringing fifty lawyers here, or any other large number. We do not contemplate it now. We may not be very eminent counsel, but I think some of the gentlemen associated in this trial know something about law. When the time comes to offer this expert testimony we have some opinions to present to the Court as to its competency. Until then, I trust, and I confidently believe, no Senator will be prejudiced in his opinion as to its competency by the declarations of any paper that there is no country squire in North Carolina but does not know it is incompetent. We do not propose to set any limits to the license of members during this trial or to suggest to them the propriety of the rules which govern them during the progress of this case, but we do ask the Senators to try this case upon the evidence submitted, and that they will not pay attention to the opinions of the press."

Mr. WATSON: "I take it for granted that every member of this Court has sufficient intelligence to know that this case is to be tried upon the evidence adduced in Court and upon the law as it is understood by them. So far as the Managers and their counsel are concerned, we do not desire or intend to attempt to control the public press nor any member of that profession. I take it for granted that the newspaper brethren will have nothing whatever to do with the conduct of this case or with its determination. We might make complaint ourselves, were we disposed to do it, of what has been done and said by persons connected with this trial, by the public press impugning the motives of the prosecution and reflecting upon the Managers, but that has nothing on earth to do with this case. We are trying this case before a board composed of intelligent men, under oath. All the Managers desire is that the case be tried according to the law and the evidence, and any point which may come up hereafter for discussion will be for discussion before a fair court."

Mr. GUTHRIE: "I suppose I may rise to a matter of personal privilege this morning: The Court will bear me out when I say I did not mention any man by the name of Russell on yesterday."

Mr. PRESIDENT: "The Court is now ready to proceed to business"

The examination of Col. Thos. S. Kenan is resumed by Mr. Guthrie, of counsel for the Managers.

This witness states: "I desire to speak loud enough to be heard by all the Senators, and if it happens I do not during my testimony, I will thank any Senator to call my attention to the fact, in order to give me an opportunity to have what I say heard distinctly by every Senator."

Mr. GUTHRIE: "When the Court adjourned yesterday you had been testifying concerning matters that happened on the 10th, 11th and 12th of October, 1900; do you enter the days of the week in your record?" A. I do not.

Q. Please turn to the almanac handed you for 1900 and give us the days of the week; what day of the week was the 10th of October? A. Wednesday.

Q. Friday was the 12th, was it not? A. Yes.

Q. And Saturday was the 13th, was it not? A. Yes; my recollection is, I stated the dates, but not the days.

Q. When was it Mr. Harris first applied for you to issue the writ; fix the date as nearly as you can? A. I think I yesterday stated I did not know the exact date, but that from memorandum I had on the books it was between October 4th and the 10th.

Q. What day of the week was October 4th? A. Thursday.

Q. Did he apply to you orally at first? A. I think I stated that he did.

Q. And afterwards made a written demand on the 10th? A. Yes.

Q. Which you have read to the Court? A. Yes.

Q. What day of the week was it you gave him a copy of the judgment of the Court? A. I gave him a copy of the judgment of the Court at his request on October 4th.

Q. When was it you say he gave you the form of the writ of mandamus; what day of the week? A. Between October 4th and October 10th; I do not remember the exact date.

Q. Did he not give it to you at the same time he gave you the written demand on October 10th? A. No; I think he gave it to me at the time he made the verbal request.

Q. When he followed that up with a written demand you had both his form of writ and the written demand? A. Yes.

Q. And those are the papers you gave Judge Faircloth? A. Yes; together with a copy of the record, I think.

Q. At what time did you give them to Judge Faircloth—the same day you received the written demand? A. No; my recollection is, that the papers were delivered to Chief Justice Faircloth on Thursday, the 11th.

Q. In the morning? A. No; in the afternoon, I think. I am not certain as to the date, but that is my impression. I think the papers were delivered to Judge Faircloth by me when he came into my office on Thursday, the 11th.

Q. When did he return them? A. Friday morning, the 12th.

Q. Judge Faircloth returned the written demand and the form of the writ prepared by Harris; then what occurred that day? A. The form prepared by Mr. Harris being of no further use was not returned.

Q. What was returned? A. A suggested form from which I prepared the papers.

Q. That was a suggested form by whom? A. It came to me in the handwriting of Justice Furches, as I stated yesterday.

Q. Who gave it to you? A. It was sent to me by one of the messengers or servants of the Court who wait upon the Judges. That came to me Friday morning, the 12th.

Q. Did you request Judge Furches or any member of the Court to prepare a form of writ for you? A. I did not. All I did was to deliver these papers, as I have stated, to the late Chief Justice and he took them with him presumably to his room.

Q. Did you issue those writs of your own motion or under the order of the Court? A. I did not issue them of my own motion.

Q. Then by what authority? A. By authority of the Court.

Q. When and where was that authority given? A. It was given on Tuesday afternoon in the Supreme Court room while the Court was in conference.

Q. What day of the month? A. The 16th of October. That was the next ensuing meeting of the Court in conference following the occasion of which I spoke yesterday.

Q. Were all the Judges there? A. They were.

Q. State what happened on that occasion? A. As nearly as I can recollect I went into the Court and stated that the responses to my application on the first application were not satisfactory,and that I wished more explicit language indicating the course and direction to be pursued by the Clerk in this matter. Thereupon the three Judges, the majority of the Court, gave their views in specific language so as to satisfy me of the advice given that it was the duty of the Clerk to issue the writ.

Q. What did Judge Furches say on that occasion? A. I can not remember the exact language used by them, but Judge Furches was always in regard to this matter direct and pointed in his view about what should be done.

Q. What direction did he give on that occasion? A. The directions given were that it was the duty of the Clerk to issue the paper.

Q. Who said so? A. Three of the Judges concurred in that view.

Q. Who were they? A. Chief Justice Faircloth, Justice Furches and Justice Douglas; Justices Clark and Montgomery non-concurring. If it is desired, I will read a memorandum of my own made at that time.

Q. Did you poll the Judges on that occasion to get their views? A. I can not say that I polled the Judges, or wheher that term would be applicable to the occasion.

Q. Did you enquire of each one separately? A. I looked at each separately during the time they were delivering their views upon this matter. I can not say, nor do I think I have a right, to poll the Court, as is done sometimes in polling a jury.

Q. You ascertained from what they said the direction they gave? A. I did.

Q. What did Judges Clark and Montgomery say on that occasion? A. Judge Clark said, "You know my views," or something to that effect. Judge Montgomery said, as well as I remember, "No;" whether he made any further declaration, I can not recall. Those two Judges, however, nonconcurred in the advice given by the majority of the Court.

Q. And so expressed themselves before you? A. Yes.

Q. Would you have issued those writs without that direction? A. I would not.

Q. Going back a day or two, you asked the Court while it was in session, before the 16th, to instruct you what to do? A. As I stated yesterday, which perhaps you will remember, the first time I went before the Court was on Friday, the 12th, at which time the response to my application was not satisfactory to me. That was testified to on yesterday.

Q. After that Friday afternoon m eting, when you were in the Court room, did you have an interview with Judge Clark; did he caution you that the Court had not directed you what to do? A. I think he did. Such is my recollection.

Q. What did he say? A. I do not remember his language.

Q. He cautioned you about it? A. Yes, I think so.

Q. That was on the 12th, Friday afternoon? A. Yes.

Q. You went into the Court in conference with all the Judges present? A. Yes.

Q. On the 16th do you remember that Justice Montgomery said, "Col. Kenan, I tell you you have no constitutional right to issue that writ?" A. I do not recollect his language, nor do I remember that he made use of that language. I remember the question asked me by the Investigating Committee upon the same point, and, I think, I am answering the question now put substantially as I answered it before the Investigating Committee.

Q. If he made that remark, do you remember it? A. I can not recall his language. He said, "No," when looking at me, and I think he followed that remark by turning and saying, "That settles it," meaning the advice given by the majority of the Court.

Q. That what they said settled it? A. So far as I was concerned; yes.

Q. Going back to Friday afternoon, when you made application to the Court and Judge Clark cautioned you, do you remember that Judge Clark requested you not to issue the writ until he could file a protest against it, or file an opinion about it? A. I do not remember that.

Q. On Saturday morning after you had applied to the Court a paper came in? A. Yes.

Q. Please look at the papers handed you and state if these are the papers Judge Clark gave or offered on Saturday morning? A. They are.

Mr. GUTHRIE: "We desire to offer these papers in evidence."

Mr. BYNUM: "We would like to enquire for what purpose the papers are offered?"

Mr. GUTHRIE: These are the papers given or sent to you? A. That is, but this one is a copy.

Q. Did you furnish to the other members of the Court, including the respondents, copies of those papers? A. I did.

Q. When did you give them to them? A. On the afternoon of Saturday, the 13th.

Q. Where? A. I delivered Judge Clark's copy to him in the Supreme Court building; I delivered to Judges Faircloth, Furches and Douglas their copies at the Yarboro House; I sent a copy to Judge Montgomery by one of the messengers. I delivered them myself to these gentlemen, but I wish to say that at the time my evidence was taken before the Investigating Committee, it was stated I sent them to the Judges. I now remember that I delivered them myself to four of the Judges and sent a copy to Judge Montgomery; not deeming it very material at the time as to the method the papers were put in their hands, I did not advert to that fact. I state now I delivered them to the four Judges mentioned.

Q. Three were delivered at one time in a room at the Yarboro Hotel? A. In their respective rooms there; that is my recollection.

Q. Do you remember at what time of day? A. In the afternoon about 4 or 5 o'clock. I know that that day I was quite busy and the messengers and servants of the Court were engaged with other matters, so I took them myself, as I do sometimes when I am going down town after business hours, and delivered them to the Judges.

Q. Did you see the Judges at the Yarboro House all in the same room? A. I did not.

Q. Did you at any other time? A. I did not.

Q. Did you see any two of them together after that? A. I did; Judges Furches and Douglas on Monday, the 15th. When I went down to see them they happened to be in the

room of one or the other, I do not remember which. Judge Faircloth was not there.

Q. But Judges Furches and Douglas were together? A. Yes; in the room of one or the other.

Q. What occurred? A. I went in for the purpose of ascertaining the position of the Judges as to this matter and to solicit their advice.

Q. After Judge Clark had given you the papers and you had given them copies of it? A. Yes; when I went on Saturday I delivered them. I had a conversation on Saturday with Judge Faircloth about this matter, and on the Monday following I had a conversation with Judges Furches and Douglas about it. I think the conference was the afternoon of Monday, but I do not remember. I went for the purpose of ascertaining their decision and of seeking their advice, and the sum and substance of the replies were that it was the duty of the Clerk upon the judgment rendered in a case decided to issue the paper.

Q. You had that conversation in the room of Judge Furches or Judge Douglas when both were present on Monday? A. Yes.

Q. After that you got the instruction on the 16th you have just testified to? A. After that I thought I would go into the Court again. The Judges did not know my purpose in going into the Court, but I wanted to do that, and I went in while they were in conference Tuesday afternoon, which was the next ensuing conference from the other occasion, and the advice given me out of Court was then ratified in Court.

Q. You use the word "advice," did you take it as advice or instruction? A. I used the word "advice" because I was seeking their advice as to the duty of the Clerk. I thought, as a written demand had been made on the Clerk, I had a right (and exercised that right) to seek the advice of the Judges anywhere—in or out of court—as to my duty. They

assumed the responsibility of advising the Clerk, and the Clerk assumed that part of the responsibility which attaches to the performance of duties of a ministerial office under the advice of a majority.

Q. You knew at the time that after Mr. Harris had made written demand on you on October 10th he had gone before the Court and asked for an order? A. Yes.

Q. And that the Court had refused to make an order? A. I stated, and will repeat now, that no order was made upon Mr. Harris's application, on the ground, as I understood—

(Objection by the Managers.)

Mr. F. H. BUSBEE: "I think the witness should be allowed to complete his answer; without it the answer does not convey the meaning the witness intends. We have a right to kno whether the Court refused to make an order, or whether the matter was not in shape for an order, and all about it."

Mr. WATSON: "If the witness was present when Mr. Harris was making his motion he can say as to what took place, but not as to what he understood."

The PRESIDENT: "That is my view; he can only state what occurred."

Q. I ask you the question, did you know at the time you went before the Court in conference on the afternoon of the 16th that Mr. Harris had been before the Court asking the Court to make an order. A. Yes.

Q. You knew that? A. Yes.

Q. When you applied to the Court for instructions to the Clerk, state if it has been the custom of the Court to give verbal orders in conference? A. That has been the custom since I have been connected with the office.

Q. That when in doubt about a matter you went to them in conference and they gave verbal instructions and you were governed by them? A. Yes; in my replies to the questions

of counsel I do not mean to go outside of any well-established rules of evidence, and when my replies are in such language as to indicate an attempt to go beyond that limit,it is an inadvertence and is not intentional.

Q. State if it is the practice of the Court to require all motions to be reduced to writing? A. It is; under the rules all motions are required to be reduced to writing.

Q. When the Court is in conference, it is in session, is it not, as a court? A. I presume so.

Q. The practice of the court is to hear argument in the morning? A. Yes.

Q. And to hold private conferences in the afternoon? A. Yes.

Q. So that it is in session in the afternoon to consider matters before the court, and in session in the morning to hear argument of such motions as may be made? A. Yes.

Q. Go back to the papers you have identified as given to you by Judge Clark on Saturday, the 13th, and state what you know about Judge Clark not being allowed to file these papers in the record in that case, or to spread them upon the minutes of the Court? A. I only know that the Clerk was directed to make no record of that matter.

Q. By whom was he directed? A. I think Chief Justice Faircloth told me so, and the Court in conference made some declaration on Tuesday afternoon.

Q. When was it you were directed not to put the matter on record? A. Tuesday afternoon.

Q. What was the direction? A. Not to make any record of that matter, meaning what is denominated the protest of Judge Clark.

Q. What about the other papers? A. They are all together. The papers were sent out together.

Q. They were directed not to made a part of the record? A. Yes.

Q. What did Judge Clark say? A. I do not remember that he said anything while I was in there.

Q. When the majority of the Court, including the respondents, directed you not to put these papers on record of the Court, did Judge Clark say anything? A. I stated I do not remember that he said anything while I was in there.

Q. What did you do in consequence of that instruction? A. I did not receive them as records.

Q. What did you do with the papers? A. They were handed back with the copies.

Q. To whom? A. To Judge Clark his copy, and the copies to the other Judges.

Q. Who handed them back to Judge Clark? A. His copy was handed to him; I have that copy here, and at his request these papers were delivered to the other Judges.

Q. What occurred about the papers on Tuesday afternoon; you say you handed Judge Clark his copy; what did Judge Furches say about his copy? A. He never mentioned anything to me about his copy.

Q. Did he give it back to you? A. No; none came back to me.

Q. Do you remember Judge Clark requesting the papers back if they would not receive them? A. I never heard that stated by anyone.

Q. Was it on the 12th or the 15th that Judge Furches sent you a copy of the mandamus writ he had prepared? A. I have already stated I received that draft from the Judge. I drew these papers after I received it on the morning of the 12th, Friday. You will find all that in the evidence.

Q. To refresh your recollection, do you remember whether you stated on your examination before the committee that it was on the 15th, Monday? A. I do not. In order to verify my statement the examination before the committee can be compared with what I state now. I stated before the com-

mittee, and I state now, that the suggested form in which the paper should be prepared was delivered to me by one of the servants of the Supreme Court who wait on the Judges, on the morning of Friday, the 12th.

Q. That was before or after you had the interview at the Yarboro Hotel? A. Before.

Q. You had both interviews afterwards? A. Yes; afterwards. If you will permit me, I will state from my evidence before the committee the answer to the question in reference to the matter now before the Court. It is stated there the 10th or 11th, and then it states next morning, which would mean the morning of the 11th or the 12th. I state now it was on the 12th.

Mr. GUTHRIE: "We now offer in evidence the papers about which Col. Kenan has been testifying—the protest and the dissenting opinion of Judge Clark, copies of which were furnished the respondents, marked Exhibits 'G' and 'H.'"

EXHIBIT "G."

To THOS. S. KENAN, Esq.,
Clerk of the Supreme Court.

White
against
The Auditor and Public Treasurer.

The other members of the Court having declined your application to instruct you whether to issue or not to issue the peremptory mandamus against the defendants, and the Court having so far failed or refused to grant the plaintiff's motion, twice made in open court, for the issuance of such writ:

Now, therefore, as one member of the Court, I hereby instruct you not to issue the said writ, because: (1) It is not authorized by the former opinion of the Court. (2) Its issuance at this juncture is contrary to the course and practice of the Court. (3) The Court is without any jurisdiction to issue the writ. (4) The Court has not ordered you to issue it, and you are without any authority until so ordered.

You will please record this upon your minutes as a part of the proceedings in this case.

WALTER CLARK, *Justice.*

White
against
Auditor and Public Treasurer.

CLARK, J., dissenting. In this cause at last term an opinion in favor of the plaintiff was filed by a majority of the Court, reciting that the defendants "wanted the opinion of the Court as to what their duty was" as public officers, and concluding, "The judgment of the Court below will be modified in conformity to this opinion, and being so reformed, judgment will be entered in this Court." No peremptory mandamus was ordered by these words nor was any issued, but the Clerk merely furnished the defendants a copy of the opinion. After the lapse of nearly five months the defendants, not having followed the opinion which it was said in the opinion "the defendants wanted," and, indeed, having replied to a legislative resolution of inquiry (of which we take judicial notice, as it is printed in the volume of Public Laws) that they had not disobeyed the Act of Assembly which forbade them to pay the plaintiff, the plaintiff's counsel, early in this term, applied to this Court to direct a peremptory mandamus to issue. This motion the Court did not grant, saying that notice of the motion had not been served upon the defendants. On October 9 the plaintiff's counsel renewed his motion, stating that the notice had then been served. The defendant's counsel was present in court, but the Court, ascertaining that the motion was not based upon affidavit, stated that it would not pass upon the matter in that status, and defendants' counsel withdrew without the necessity of being heard.

Since then, without further notice to the defendants, the Clerk of this Court has drawn up a peremptory mandamus to the Auditor to allow this claim, and to the Public Treasurer to pay the same, and, presenting the same to the Court, asked its instruction, whether to issue the same.

As a member of the Court, I then asked the Court to instruct the Clerk not to issue the peremptory mandamus. This was declined.

With all respect to my associates, and solely in compliance with my oath of office to "support, maintain and defend" the Constitution, I wish to put on record my non-concurrence in such action, with my reasons therefor:

1. I think, as the Court has already twice decided in this case, at this term, the writ should not issue till after notice of the motion served upon the defendants, and upon affidavits filed as a basis for such motion and opportunity for defendants to be heard in reply. The judgment below, which was modified and affirmed, did not order a peremptory mandamus, but simply a mandamus which, by the

uniform course and practice of the Courts, is an alternative mandamus (*Cotten v. Ellis*, 52 N. C., at p. 550), even when the mandamus is against a county which is suable and against which a judgment has been obtained. *Fry v. Commissioners*, 82 N. C., 304; *Hughes* v. *Commissioners*, 107 N. C., 605. After such mandamus has been served, if it is not obeyed, under the settled procedure, a notice is served upon defendants, upon affidavits (as the Court has already held) to show cause why a peremptory mandamus should not issue, and if it is then ordered, it is by the Court, never by the Clerk. In this cause the ordinary mandamus has not been yet issued or served. It appears that the defendants have had no precept issued to them, but merely a copy of the opinion of the Court.

4. The writ recites: "It being further declared by the Court that the defendant, Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified," etc., whereas, in fact, no such language occurs in the opinion of the Court. The Court itself audited the claim by deciding upon the amount due plaintiff by the State, and there is no language ordering that the Auditor "shall proceed to pass upon and audit said claim." While a peremptory mandamus is "process in the nature of an execution," it is not such an execution as issues of course, as upon a judgment of debt, but it only issues upon an order of the Court, and has no validity except when thus ordered to issue.

5. The peremptory mandamus recites that the Court has declared "that the defendant, W. H. Worth, State Treasurer, shall pay the amount stated in the warrant drawn by the defendant, Hal W. Ayer, as Auditor aforesaid," whereas such language does not appear in the opinion of the Court. There is a wide distinction between an opinion of the Court that the State is justly indebted to a plaintiff and a peremptory mandamus to an official charged with the custody of the public funds. This distinction is clearly marked by the Constitution, Article IV, Section 9, which provides that this Court has "original jurisdiction to hear claims against the State, but its decisions shall be *merely recommendatory; no process in the nature of an execution shall issue thereon.*"

6. The peremptory mandamus directed to the Auditor further recites: "You are hereby commanded absolutely and peremptorily, without delay, to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as may be found to be due the plaintiffs thereon"—and the writ directed to the State Treasurer recites: "You are commanded *absolutely* and *peremptorily* to pay the warrants issued by the State Auditor on you as State Treasurer in favor of the plaintiffs." Those peremptory writs are not authorized by the following language of the opinion:

"The judgment of the Court below will be modified in conformity with this opinion, and being so reformed, judgment will be entered in this Court," for a reference to the judgment below, printed in 126 N. C., at page 572, shows that by it *no absolute and peremptory* mandamus was ordered.

At last term I dissented (126 N. C., 596) from the majority opinion, affirming the judgment below, which was merely for a mandamus, and I shall not repeat the reasons there given. But here, that opinion not having been accepted by the defendants, it is proposed that a peremptory mandamus be issued to high State officials.

In view of the action of the General Assembly, by the resolution above referred to, passed since the opinion of this Court, there is a conflict of jurisdiction between this and the Legislative Department of the Government, it will be both courtesy and wisdom not to make a further conflict inevitable by permitting the Clerk to issue a *peremptory* and *absolute* order to pay the State's money to the plaintiff. It would be more seemly to give the new Legislature soon to assemble an opportunity at least to withdraw their inhibition upon the Treasurer and Auditor against paying plaintiff.

For the first time in the history of this State these writs, if they shall issue, will direct the Public Treasurer and the State Auditor to pay public funds entrusted to their care to parties to whom, by an Act of the Legislature, they are forbidden to pay them.

At the request of Judge Clark I caused these papers to be copied and sent around.

White
against
Auditor and Public Treasurer.

To THOS. S. KENAN, Esq.,
Clerk of the Supreme Court.

The other members of the Court, having declined your application to instruct you, whether to issue or not to issue the peremptory mandamus against the defendants, and the Court having so far failed or refused to grant the plaintiff's motion, *twice made in open court for the issuance of such writ; now, therefore:*

As one member of the Court, I hereby instruct you not to issue the said writ, because (1) *It is not authorized by the former opinion of this Court.* (2) *Its issuance at this juncture is contrary to the course and practice of the Court.* (3) *The Court is without any jurisdiction to issue the writ.* (4) The Court has not ordered you to issue it, *and you are without any authority until so ordered.*

You will please record this upon your minutes as a part of the proceedings in this case.

(Signed) WALTER CLARK,
Justice.

White
against
Auditor and Public Treasurer.

CLARK, J., dissenting. In this cause at last term an opinion in favor of the plaintiff was filed by a majority of the Court, reciting that the defendant "wanted the opinion of the Court as to what their duty was" as public officers, and concluding, "The judgment of the Court below will be modified in conformity to this opinion, and being so reformed, judgment will be entered in this Court." No peremptory mandamus was ordered by these words nor was any issued nor was it so understood by the Clerk, as he merely furnished the defendants a copy of the opinion. After the lapse of nearly five months, the defendants not having followed the opinion which it was said in the opinion "the defendants wanted," and indeed having replied to a legislative resolution of inquiry (of which we take judicial notice, as it is printed in the volume of Public Laws), *that they had not disobeyed the act of the Assembly which forbade them to pay the plaintiff*, the plaintiff's counsel, early in this term applied to this Court to direct a peremptory mandamus to issue. This motion the Court did not grant, saying that *notice of the motion had not been served upon the defendants.* On October 9 the plaintiff's counsel renewed his motion, stating that the notice had then been served. The defendants' counsel was present in Court, but the Court ascertaining that the motion was not based upon affidavit, *stated that it would not pass upon the matter in that status*, and defendants' counsel *withdrew without the necessity of being heard.*

Since then, without further notice to the defendants, the Clerk of this Court has *ex mero motu* drawn up a peremptory mandamus to the Audtor *to allow this claim*, and to the Public Treasurer to pay the same, and presenting the same to the Court asked its instruction to issue the same. The Court declined to so instruct its Clerk. As a member of the Court, *I then asked the Court to instruct the Clerk not to issue the peremptory mandamus.* This was also declined.

With all respect to my associates, and solely in compliance with my oath of office to "support, maintain and defend" the Constitution, I wish to put on record my non-concurrence in such action, with my reasons therefor:

1. I think that the Clerk of this Court is entitled to be instructed

by the Court, of which he is the mere agent, whether to issue or not to issue the writ, and especially that in so grave and delicate a matter as issuing a peremptory and absolute mandamus against an equal and co-ordinate department and the Treasury of the State, the Clerk should not be forced, or permitted, to decide the legal right to do so by the Court declining the responsibility.

2. *I think, as the Court has already twice decided in this case, at this term, the writ should not issue till after notice of the motion served upon the defendants and upon affidavits filed as a basis for such motion and opportunity for defendants to be heard in reply.* The judgment below, which was modified *and affirmed*, did not order a peremptory mandamus, but simply a mandamus, which, by the uniform course and practice of the Courts, is an alternative mandamus (*Cotten v. Ellis*, 52 N. C., at p. 550), even when the mandamus is against a county which is suable and against which a judgment has been obtained. *Fry* v. *Commissioners*, 82 N. C., 304; *Hughes* v. *Commissioners*, 107 N. C., 605. After such mandamus has been served if it is not obeyed, under the settled procedure, a notice is served upon defendants, upon affidavits (*as the Court has already held*), to show cause why a peremptory mandamus should not issue, and if it is then ordered, it is by the Court, never by the Clerk. In this cause the ordinary mandamus has not been yet issued or served. It appears that the defendants have had no precept issued to them, but merely a copy of the opinion of the Court.

3. I regard it as dangerous and unprecedented that the Clerk of the Court should construe an opinion of this Court and issue an absolute and peremptory mandamus against public officials charged with the safe keeping and disbursement of the public funds, more especially when the plaintiff has twice moved in open Court for an order to issue such mandamus and the Court did not so direct, and has besides refused the direct application of the Clerk to the same effect. The Clerk has no authority to act except as the agent of the Court.

4. The writ prepared by the Clerk *ex mero motu* recites: "It being further declared by the Court that the defendant, Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified," etc., whereas, in fact, no such language occurs in the opinion of the Court. The Court itself audited the claim by deciding upon the amount due plaintiff by the State, and there is no language ordering that the Auditor "shall proceed to pass upon and audit said claim." While a peremptory mandamus is "process in the nature of an execution," it is not such an execution as issues of course, as upon a judgment of debt, but it only issues upon an order of the Court and has no validity except when thus ordered to issue.

5. The peremptory mandamus drawn up by the Clerk recites that the Court has declared "that the defendant, W. H. Worth, State Treasurer, shall pay the amount stated in the warrant drawn by the defendant, Hal W. Ayer, as Auditor aforesaid," whereas, such language does not appear in the opinion of the Court. There is a wide distinction between an opinion of the Court that the State is justly indebted to a plaintiff and a peremptory mandamus to an official charged with the custody of the public funds. This distinction is clearly marked by the Constitution, Article IV, section 9, which provides that this Court has "original jurisdiction to hear claims against the State, but its decisions shall be *merely recommendatory; no process in the nature of an execution shall issue thereon.*"

6. The peremptory mandamus drawn up *ex mero motu* by the Clerk directed to the Auditor, further recites: "You are hereby commanded *absolutely* and *peremptorily*, without delay, to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as may be found to be due the plaintiffs thereon"—and the writ directed to the State Treasurer recites: "You are commanded *absolutely* and *peremptorily* to pay the warrants issued by the State Auditor on you as State Treasurer in favor of the plaintiffs." Those peremptory writs are not authorized by the following language of the opinion: "The judgment of the Court below will be modified in conformity with this opinion, and being so reformed, judgment will be entered in this Court," for if such words had authorized the Clerk to issue these writs, the Court surely would not have refused to direct the Clerk, upon this application by him, to issue these writs. Besides, as already stated, a reference to the judgment below, printed in 126 N. C., at page 572, shows that by it *no absolute and peremptory* mandamus was ordered.

I therefore dissent from the refusal of the Court to direct the Clerk not to issue this peremptory mandamus, because such writs should not go out with the implied authority of the Court when the Court has refused to direct the Clerk to issue them, and though twice so moved by the plaintiff's counsel, did not grant the application, the defendants' counsel being present when the second motion was not allowed, and having had no notice of this proposed action.

At last term I dissented (126 N. C., 596), from the majority *opinion affirming the judgment below, which was merely for a mandamus* and I shall not repeat the reasons there given. But here, that opinion, not having been accepted by the defendants, it is proposed that a peremptory mandamus be issued to high State officials, and that

by mere action of the Clerk of this Court, who has no judicial functions.

In view of the action of the General Assembly, by the resolution above referred to, passed since the opinion of this Court, there is a conflict of jurisdiction between this and the legislative department of the government, it will be both courtesy and wisdom not to make a further conflict inevitable by permitting the Clerk to issue a *peremptory* and *absolute* order to pay the State's money to the plaintiff. It would be more seemly to give the new Legislature, soon to assemble, an opportunity at least to withdraw their inhibition upon the Treasurer and Auditor against paying plaintiff.

For the first time in the history of this State these writs, if they shall issue, will drect the Public Treasurer and the State Auditor to pay public funds entrusted to their care to parties to whom, by an act of the Legislature, they are forbidden to pay them, and these writs are drawn up *ex mero motu* by the Clerk and are to be issued by him, though the Court has refused his application for instruction, whether or not to issue the same. In view of the danger of such a precedent, this dissent is respectfully filed and asked to be printed as such in the volume containing the opinions and the dissenting opinions of this term.

Mr. OSBORNE: "As I understood, Mr. Guthrie asked the witness if that is the paper filed by Judge Clark with him."

Mr. C. M. BUSBEE: "Yes, and copies of which were served upon the respondents."

Mr. OSBORNE: "I suppose all agree it has to be identified as the copy served upon the respondents."

Mr. F. H. BUSBEE: Can you state whether the copy now handed you for identification is a copy in its present form of the paper served upon the Judges? I call your attention to the various changes appearing in it on the several pages. A. It is not a copy in the form in which it was delivered to the Judges.

Mr. BUSBEE: "Then the respondents object."

Q. Mr. C. M. BUSBEE: What is the variance? A. There are some sentences stricken out of this copy.

Mr. C. M. BUSBEE: You mean that that is a copy

of the paper served upon the Judges, except that some of the writing has been erased, and if you read the part erased it would constitute a perfect copy? A. Yes; I think so.

Mr. F. H. BUSBEE: "We do not think a mutilated copy with erasures ought to be introduced in evidence, even if the parts erased can be read through the erasures. We think it is no longer a copy."

The PRESIDENT: "I think you are entitled to file a copy, and if the witness will testify it is a correct copy it will be evidence."

Mr. F. H. BUSBEE: "We desire to know with what view the copy of the paper is offered in evidence."

The PRESIDENT: "I think the paper will speak for itself as to its object."

Mr. C. M. Busbee reads paper (the dissenting opinion of Judge Clark and the protest).

Mr. F. H. BUSBEE: "We desire both copies filed—both the mutilated copy and the original copy furnished by the respondents."

Mr. GUTHRIE: "We have no objection."

Mr. OSBORNE: "The two papers are not the same."

Mr. WATSON: "The papers speak for themselves."

Q. You have seen the smooth copy from which Mr. Busbee read and the copy with the erasures; when were the erasures made? A. I do not know.

Q. Were you present in conference at the time? A. At the time Judge Clark made these erasures? A. I was not. I know nothing about it.

Q. You have been Clerk of this Court for many years—since 1886? A. Yes.

Q. Did you ever before issue a mandamus writ from that Court? A. No, sir.

Q. These were the first you ever issued? A. Yes.

Q. And you have been Clerk since 1886? A. Yes.

Q. Before you were Clerk of the Court you were Attorney-General? A. Yes; for two terms, eight years.

Q. And as Attorney-General you were Reporter for the Supreme Court? A. Yes.

Q. You see before you a pile of records; what are they? A. These are records on file in the Supreme Court which were brought here at the request of counsel for the prosecution this morning.

Q. Do they all relate to one case, or to a number of cases? A. To a number of cases.

Mr. GUTHRIE: "These are records in what are known as the office-holding cases, the original records, and without reading them we desire to offer them in evidence."

Mr. BYNUM: "We would like to know the names of the cases referred to."

Mr. GUTHRIE: Q. Please state the list of cases? A. When the counsel for the prosecution requested me to search and bring these records here, I got them up and had my clerk take down the name of each case. There are fifteen and the names appear on this memorandum, as follows:

1. Caldwell v. Wilson, from Iredell.
2. Wood v. Bellamy, from Wake.
3. Ewart v. Jones, from Buncombe.
4. Cook v. Meares, from New Hanover.
5. McCall v. Gudger, from Buncombe.
6. Green v. Owen, from Davidson.
7. Abbott v. Beddingfield, from Wake.
8. McCall v. Webb, from Buncombe.
9. Cherry v. Burns, from Wake.
10. Cunningham v. Spruill, from Wake.
11. White v. Hill, from Pamlico.
12. Day's Case, from Wake.
13. Wilson v. Jordan, from Buncombe.
14. Railroad v. Dortch, from Edgecombe.
15. Bryan v. Patrick, from Edgecombe.

Q. There are fifteen in all, and these are the original records? A. Yes; I can furnish a list if desired.

Senator WOODARD: "I would like to have a list." A. I can give it to you this afternoon I think.

Senator LONDON: "I would like to ask of counsel if they desire to have that mass of evidence printed in the official proceedings?"

Mr. C. M. BUSBEE: "No; we introduced them because there was some question as to whether the Supreme Court Reports would be considered as evidence."

Mr. OSBORNE: "I suggest now to the Managers and their counsel representing the House of Representatives, that in order to save further trouble upon this question we agree that the whole course of the North Carolina Reports shall be considered as in evidence in this case."

Mr. WATSON: "We agree to that."

Mr. GUTHRIE: "I suppose it will be well enough to have it understood we will not be required to read all in any one of the one hundred and twenty-seven volumes, but only such parts as may be desirable."

Cross-examination.

By Mr. BUSBEE:

Q. This case was docketed at the September Term, 1900, of the Court and appears upon that docket? A. Yes.

Q. It is docketed from the county of Perquimans in which the plaintiff resided? A. Yes.

Q. It appears upon the docket of February Term, 1900? A. Yes.

Q. There was an *advisari* at the December Term? A. Yes.

Q. And at the February Term an opinion was delivered on May 22d, was there not? A. I think so.

Q. The opinion of the Court was written by Justice Furches, a concurring opinion by Justice Douglas, a dissenting opinion by Justice Clark, and another dissenting opinion by Justice Montgomery? A. Yes.

Q. The opinion directs the entry of the judgment in the Supreme Court, does it not? A. It does.

Q. The opinion of the Supreme Court modifies the judgment taken in Perquimans County in that it reduces the salary of the plaintiff from nine hundred dollars to four hundred dollars, does it not? A. I know it modifies the judgment; I do not remember the exact amount of money as stated by counsel.

Q. The judgment below as modified is affirmed? A. Yes.

Q. Is it not according to your usual practice to enter judgments in the Supreme Court when the judgment below is modified and affirmed; is it not in accordance with the rules of the Court? A. There have been cases in which judgments have been entered in the Supreme Court.

Q. Have there not been many cases; I do not mean it is ordinarily done, but many cases in which it is done? A. I really can not say how many cases there have been, but there have been judgments entered in the Supreme Court.

Q. This judgment then was entered in accordance with the rules of the Court? A. Yes.

Q. In *Caldwell v. Wilson,* was not the judgment entered in the Supreme Court? A. Yes.

Q. You have stated that no writ of mandamus had ever before been issued from the Supreme Court; was there not a peremptory writ of mandamus entered in the case of *Caldwell v. Wilson,* and a writ of mandamus issued the very day of the rendition of the judgment in that case? A. That is my recollection. The papers will show.

Q. Please get out the papers from the bundle and read the judgment by the Judge who signed it in *Caldwell v. Wilson.*

Witness reads the opinion in *Caldwell v. Wilson.*

Q. Did you ever issue any writ of that sort before or since? A. No.

Q. It was served the same afternoon? A. Yes; late in the evening.

Q. State if you are familiar with the practice of the Supreme Court, having been Attorney-General, Reporter to the Supreme Court, and Clerk for about sixteen years? A. I think I am familiar with the practice of the Court.

Q. Do you know of any opinion being filed in a case which was not before the Court, in a case in which opinions and dissenting opinions had been filed at a preceding term? A. I have not known of such a case.

Q. Is it not contrary to the practice of the Court, and never before requested, in your opinion, for a Justice to seek to file a dissenting opinion in a case that went off the docket at the preceding term? A. Yes; that is so.

Q. This was the first time such a request or suggestion had ever been made, to your knowledge? A. Yes; that is so.

Q. Did you ever know of a Judge who filed a dissenting opinion at a preceding term attempt to file a dissenting opinion at the succeeding term? A. I never knew of an instance of the sort before.

Q. According to the orderly practice of the Court, if a writ of execution or mandamus, as the case may be, when sought, is it not issued by the Clerk? A. It is the ordinary practice.

Q. Is not a writ of mandamus following a judgment analogous to an execution? A. Practically.

Q. I ask you if objection had not been made to this writ, if objection had not been made, you would, in the orderly practice, have issued it? A. I think so.

Q. Upon demand of the plaintiff and without notice, the orderly practice is to issue the writ? A. Yes.

Q. I think you said that after the filing of an opinion and

an entry of judgment the case is removed from the docket? A. The last term the case appears on the docket is the February Term, 1900, when it was concluded; it went off the docket then.

Q. So that at the September Term, 1900, the case was not on the docket? A. No.

Q. When the suggestion was made concerning the affidavit, I understood you to say that the affidavit suggested was an affidavit that the Clerk had refused to issue the writ as requested; did you not understand that to be the affidavit suggested by the Court?

Mr. C. M. BUSBEE: "We object to what he understood to be the affidavit suggested; he can only state what the Court said; not what he understood the Court to mean."

The PRESIDENT: "The witness can only state facts."

Q. Did not Justice Montgomery say to Mr. Harris, in your presence, "Have you applied to the Clerk for the issuance of the writ?" A. Not at first; but when he went in the second time.

Q. State what Justice Montgomery said? A. I think he said you ought to apply to the Clerk, or suggested that he should apply to the Clerk; I do not remember his exact language.

Q. It being the duty of the Clerk to issue all proper writs upon judgments docketed in his office? A. Yes; that is the duty of the Clerk, as I understand it.

Q. Did not Justice Montgomery, on the final hearing, after expressing his individual opinion in accordance with the dissenting opinion he had already written, say that the majority of the Court having directed you,it was your duty to issue the writ? A. I do not recollect his language. I think I have stated in this examination that my recollection is that his language was, "that settles it."

Q. Do you recollect whether Mr. Harris left the form of

the writ of mandamus at the time he made verbal application to you, or at the time he made the written application for the issuance of the writ? A. He left the form of the paper at the time he made the verbal application, I think. That is my recollection.

Q. I understood you to say you handed this blank unexecuted writ and his letter requesting it and the record in the cause to the Chief Justice of the Court? A. I did.

Q. Did you do that to get the opinion and instruction of the Court as to your duty in the premises? A. When I handed the papers to the Chief Justice I called his attention to them as to what they were, but I did not at that time make any request for specific or particular instructions in the matter.

Q. Had you not had a conversation with the Chief Justice before that, a day or so before, concerning the writ and its form? A. I can not recollect that; I do not remember.

Q. Had you not told the Chief Justice before that that Mr. Harris had submitted to you a form of writ? A. I may have done so, but I am not certain as to that.

Q. What passed between you about it? A. I do not remember. He knew I had the writ because I had handed it to him.

Q. Before you handed it in connection with the demand? A. I do not recollect.

Q. You stated yesterday you had had a conversation with the Chief Justice in the Supreme Court room; did that include a statement that Harris had handed you the form of writ he desired you to sign? A. That form of writ was in the papers I handed the Chief Justice. I called his attention to the papers I handed him.

Q. Did you call his attention to the fact that the papers included a proposed form of writ prepared by the counsel for the plaintiff? A. No, not in that language. I handed the

papers to him calling his attention to the matter and the papers spoke for themselves.

Q. That is what I have asked. When you called his attention to the papers, did you not state that among them was a proposed writ prepared by plaintiff's counsel? A. I showed him all the papers I handed him; I do not remember if I stated that the writ was prepared by the plaintiff's attorney or not. I can not remember about that.

Q. They included that blank form of writ? A. Yes.

Q. And at the request of Judge Faircloth you handed the papers to him at once? A. Yes; I did that myself.

Q. You say without any request from the Court, as Clerk and as a ministerial officer, you handed him the writ in the form proposed by plaintiff's counsel; why did you hand it to the Chief Justice?

Mr. C. M. BUSBEE: "We object to the question."

Mr. F. H. BUSBEE: "This is cross-examination of the plaintiff's witness."

The PRESIDENT: "The witness will answer the question."

A. I handed those papers to the Chief Justice that he and the Court might be in possession of all the papers in reference to this matter which came to me, and, as I stated before, I called his attention to the papers I handed him. He handed the papers back to me the same afternoon, and went to his lodgings; the next afternoon, I think, he came in and asked for the papers, and I delivered them to him.

Q. What passed between him and Judge Furches? A. I do not know; I was not present.

Q. When the papers were returned to you they contained the draft of a writ, which was afterwards issued, in the handwriting of Justice Furches? A. When the letter was returned to me, the demand of the plaintiff's attorney, the typewritten writ supposed to have been prepared by the

plaintiff's attorney was not returned, but a suggested form in which the writ should be prepared was handed to me, and I prepared the writ from that form. That paper was in the handwriting of Justice Furches.

Q. What differences were there in the two forms? A. I did not read the form prepared by the plaintiff's attorney.

Q. So, without passing upon the form handed you, you submitted it to the presiding officer of the Court, together with the demand? A. I did.

Q. And you received, through a messenger, another form of writ, in the handwriting of Justice Furches? A. Yes.

Q. The first time you went into the conference room, as I understand it, one of the Justices gave you his opinion; Justice Furches stating it was your duty to issue the writ? A. Yes.

Q. Judge Faircloth said what? A. As I stated before, I can not remember the exact language of either of the Justices. Justice Furches was pointed and direct in what he said, as he always was about this matter. Judge Faircloth, according to my recollection, stated it was his individual view, or opinion, that the writ should issue. Justice Douglas stated a proposition, in about these words: "If judgments of a Court can not be executed, the Judicial Department of the government would be inefficient," or something of that sort. That was on Friday afternoon, the 12th.

Q. Because of a failure to get explicit advice you returned to the consultation room on the 16th? A. Yes; that was the next meeting of the Court in conference.

Q. State whether or not Chief Justice Faircloth, or any other member of the Court, announced to you a ruling of the Court, of the Justices as a Court, upon the matter of your issuing the writ? A. I do not remember anything about that.

Q. I ask you, if each Justice did not give you his individ-

ual opinion, and you did not act upon the opinion of the majority of the Court? A. I went in and submitted my application for advice on the afternoon of the 16th, and the replies to it were specific and pointed, and satisfactory to me. Each individual Judge gave his views.

Q. And you acted upon the opinion of a majority of the Court, did you not, that is, of three Judges? A. I did; upon the opinion of the majority.

Q. And one of the two minority Judges remarking, that as the majority of the Court had given their opinion, "that settles it"? A. That is my recollection of what Justice Montgomery said.

Q. You then prepared the writ in accordance with the form, and it was issued? A. I had prepared the writ before that, but it was not issued until the following Wednesday morning, the 17th of October.

Q. When did Justice Clark first say anything to you about the issuance of the writ of mandamus? A. I do not recollect.

Q. State, as nearly as you can? A. I do not know whether it was before or after I went into the Court the first time. He was opposed to issuing the writ.

Q. No application was made to you for the issuance of the writ before the September term? A. None.

Q. The first application was made about October 4th? A. On October 4, the plaintiff's attorney obtained copies of the judgment from me, and it was between October 4 and October 10 that he made his application for the issuance of the writ.

Q. Was it not about that time, as soon as Judge Clark knew that fact, that he advised you not to issue it? A. I think so; I do not remember the date.

Q. Did you have any conversation with Judge Clark outside of the court room upon the subject? A. He came into

my office one day, and spoke about the matter. I do not remember what he said, but he was talking about it, and in reference to the Court's declining to give advice about it.

Q. Did he not advise you, both before and after the advice of the majority of the Court had been given to you to the contrary, not to issue the writ? A. He advised me not to issue the writ; he did not have any conversation with me after the conference on the 16th, when the majority of the Judges in conference gave me their advice. He did not say anything to me about it, but he did write me the letter which has been put in evidence, which came to me on the 13th, being after the first occasion I went into the conference room for advice, upon which occasion, as I have stated, the replies to the application for advice were not satisfactory to me. The letter I received on the 13th was in reference to the matters which occurred the previous afternoon.

Q. Did he not come into your office and say, in substance, that the opinion of the majority of the Justices was not clear and suggest to you that you had best not act until you could get a clear opinion? A. I think he sent me a message through the phone to that effect.

Q. So, that he called your attention to the fact, as it appeared to him, that the opinion of the majority of the Justices had not been clear, and he advised you not to issue the writ? A. He did not give any advice in the phone message. My recollection is, that he simply called my attention to the fact that the advice had not been clear and direct.

Q. Was not that one of the reasons which induced you to seek subsequent advice on the 16th? A. I had concluded to do that before, having thought of it after I went out of the conference room, but the message from him stimulated my caution to some extent; it did not, however, diminish my willingness to obey the majority.

Q. Have you a copy of the opinion offered by Justice Clark? A. I have.

Q. I ask you if the erasures which now appear in the paper, were made when you handed the paper to Judge Clark? A. No; I know nothing about the time erasures were made.

Q. None of them were there when you handed the paper back to Judge Clark? A. No.

Q. I now ask you to read the parts stricken out? (Of Exhibit "H.") A. The word "defendant," in the third line from top, is changed to "defendants"; in the 7th line from the top, the words "nor was it so understood by" are stricken out, and the word "but" is substituted. In the 8th line from the top, after the word "clerk," the words "as he" are stricken out. In the 7th line from the bottom, the words "*ex mero motu*" are stricken out; in the 5th line from the bottom the word "whether" is inserted after the word "instruction." In the 4th line from the bottom, the words "the court declined to so instruct its Clerk," are stricken out. In the 2d line from the bottom, the word "also" is stricken out. On the second page, commencing fourth line from the top, the following is stricken out: "1. I think that the Clerk of this Court is entitled to be instructed by the Court, of which, he is the mere agent, whether to issue or not to issue the writ, and especially that in so grave and delicate a matter as issuing a peremptory and absolute mandamus against an equal and co-ordinate department, and the Treasury of the State, the Clerk should not be forced, or permitted, to decide the legal right to do so, by the Court declining the responsibility." Paragraph "2" is changed to "1." Paragraph 3, commencing near bottom of page 2, and going over on page 3, is stricken out, as follows:

"3. I regard it as dangerous and unprecedented that the Clerk of the Court should construe an opinion of this Court,

and issue an absolute and peremptory mandamus against public officials charged with the safekeeping and disbursement of the public funds, more especially when the plaintiff has twice moved in open court for an order to issue such mandamus, and the Court did not so direct, and has besides refused the direct application of the Clerk to the same effect. The Clerk has no authority to act except as the agent of the Court."

In line 5, on page 3,after the word "writ," the words "prepared by the Clerk *ex mero motu,*" are stricken out, and above them is written "on the suggestion of members," which words are also stricken out.

In the first line of paragraph 5, after the word "mandamus," the words "drawn up by the Clerk" are stricken out.

In paragraph 6, near bottom of page, after the word "mandamus," the words "drawn up *ex moro motu* by the Clerk," are stricken out; also the word "offered" written above them, is stricken out.

On page 4, commencing at end of 8th line, the following is stricken out: "If such words had authorized the Clerk to issue these writs, the Court surely would not have refused to direct the Clerk, upon this application by him, to issue these writs. Besides, as already stated,"

The following paragraph, on page 4, commencing at 14th line on said page, is stricken out:

"I therefore dissent from the refusal of the Court to direct the Clerk not to issue this peremptory mandamus, because such writs should not go out with the implied authority of the Court, when the Court has refused to direct the Clerk to issue them, and though twice so moved by the plaintiff's counsel, did not grant the application, the defendant's counsel being present when the second motion was not allowed, and having had no notice of this proposed action."

Also, beginning in 6th line from bottom of page 4, after

the word "officials," the following is stricken out: "And that by mere action of the Clerk of this Court, who has no judicial functions."

On page 5, nine lines from the top,the following is stricken out, "and these writs are drawn up *ex mero motu* by the Clerk, and are to be issued by him, though the Court has refused his application for instruction whether or not to issue the same. In view of the danger of such a precedent, this dissent is respectfully filed, and asked to be printed as such in the volume containing the opinions and the dissenting opinions of this term."

In the above stricken out language, the word "official" is inserted after the words "application for" and before the word "instruction," this is also stricken out.

Q. Is this original letter filed with you in the handwriting of Justice Clark? A. Yes; it is the original letter in his handwriting.

Q. Did Justice Clark file, in this cause, a dissenting opinion? A. Yes; filed it.

Q. Kindly read this expression from the letter of Judge Clark. (Hands a paper to the witness which has been identified as the original letter of Judge Clark.) A. "As one member of the Court, I hereby instruct you not to issue the said writ, because (1) It is not authorized by the former opinion of the Court."

Q. I now ask you to read from the dissenting opinion of Judge Clark from the mark I have made, on page 602, of the Report of the Supreme Court.

(Counsel for the Managers enter an objection to the witness reading the Report.)

Mr. F. H. BUSBEE: "My object is this: The Clerk has just read a letter from Justice Clark, stating that the former opinion of the Court did not authorize or direct the issuance of a writ of mandamus. We desire to prove that

the Clerk had a statement made by the same Justice, not in an informal opinion, but in a dissenting opinion of the Court, stating the reverse. The former opinion did direct the issuance of the writ, and the Clerk was entitled to base his action as much, or more, upon the dissenting opinion filed in the cause, as upon an informal opinion."

Mr. C. M. BUSBEE: "I should like to ask if the object is to impeach the witness or the Justice?"

Mr. F. H. BUSBEE: "Its object is neither to impeach the witness nor the Justice. It is evidence to show that the witness was distinctly informed by the dissenting opinion filed properly with the opinion of the majority of the Court, that the opinion did direct the issuance of the writ. We have a right to compare the language in the two papers. We desire to show that Judge Clark wrote, on the 12th of October, 'I hereby instruct you not to issue the said writ, because it is not authorized by the former opinion of the Court, and also to show that the Clerk was instructed by the same Justice, in his dissenting opinion, which holds the salary fixed at $400.00, 'It directs its mandamus to issue to the Treasurer to pay that sum to the plaintiff which is 'process in the nature of an execution' to enforce collection out of the State.' The dissenting opinion of the Justice admits that the opinion directs the issuance of the writ of mandamus. So that the Clerk had the authority not only of the majority of the Court, but of the dissenting Justice, Clark, that the opinion of the Court did direct the issuance of the writ."

The PRESIDENT: "I sustain the objection, on the ground that the reports are in evidence, and can be used and quoted on the argument."

Mr. F. H. BUSBEE: "This dissenting opinion has been put in evidence by the plaintiffs, not as a part of the general record, but it was put in evidence at the first session of the Court, and we think it is competent evidence, not generally

as law, but is competent to show that the Clerk was in fact instructed by the dissenting Justice, that the former opinion of the Court did direct the issuance of the writ. We are not claiming to put it in as a part of the volumes of reports, as law, but as evidence which has already been offered by the plaintiffs as a part of the instructions and opinions of the Court, and of the Justice in this case, to show that this particular matter, which is the very gist of the action, was instructed by the dissenting Justice, that the opinion of the Court did direct the issuance of the writ."

The PRESIDENT: "Notwithstanding the plaintiffs have put it in evidence you get the benefit of it."

Mr. OSBORNE: "I do not exactly undertsand what the question is here. I would like to comprehend exactly what you are objecting to. I think I understand it, but if I do not, when you answer me I know you will make yourself very clear."

"Mr. Busbee asked Colonel Kenan to read a certain passage from a Supreme Court Report. That evidence is already before this Court. There it lies in one of the papers, and has already been established as a record by this witness. Now, what are we asking this witness to do? Simply to rveert to the record and read what we propose to argue to the Court at a certain point in this case. Is not that competent at all times? We have a right to read it ourselves at any time in the argument; the right to read it now; and the right to request an intelligent witness to read it whenever we get ready, and why, in the name of common sense, can we not pick up a volume of the Reports and ask him to read it now. We are simply requesting the witness to read a part of the testimony of the Court."

Mr. WATSON: "Why ask that to be read by Colonel Kenan, then; it is now in print, and it is in evidence."

The PRESIDENT: "I sustain the objection."

Mr. BUSBEE: "We ask them to show, and offer an extract from the same opinion, on page, 608, for the purpose of showing, that the witness had in effect received instructions from the dissenting Justice, Clark, that the former opinion directed the writ of mandamus to issue, and that upon that very ground, the fact that the opinion directed the writ to issue, Justice Clark dissented."

Mr. C. M. BUSBEE: "To that we object; it is absolutely inadmissible for a Clerk to take his instructions from a dissenting opinion."

Mr. OSBORNE: "It is a singular proposition to my mind. What have our friends introduced? A paper called by various names; in order that I may agree as far as possible, I will term it a protest. It is to the Clerk of the Court, and goes on to protest against the issuance of this mandamus. They put it in evidence on what grounds? To show that the Clerk did not act upon Judge Clark's opinion, but upon the opinion of the majority of the Court. I can imagine no other, unless it was for that purpose. I think it is equally competent for us to show that, before that time, this very dissenting Justice had, with equal solemnity, declared that a mandamus was ordered. And therefore, that the Clerk had a right to look back at the decisions when deciding whether it was his duty to issue the writ. To make myself clear: The prosecution have introduced a paper to show a protest against the issuance of the writ, and among others, that it was not ordered by the former opinion in the cause delivered at the Spring Term, that the writ should issue. That is their paper; it comes from them. Now we propose to look back at the dissenting opinion which the same Judge filed at the Spring Term, and show that he then said that the writ of mandamus was ordered. For what purpose? We want to show that the Clerk not only acted on the private opinion of the Judges, but also upon the opinion filed by this very dissenting Judge."

The PRESIDENT: "You may ask the witness if he received any other instructions."

Mr. BUSBEE: Q. Did you receive other instructions of a Justice of the Court, upon the question as to whether the former opinion of the Court directed or authorized the issuance of the writ of mandamus in the dissenting opinion, calling attention to page 602?

Mr. F. H. BUSBEE: Please read to yourself the places I have marked on page 602.

Mr. Manager ALLEN: "It is admitted that all these opinions are in evidence; I take it, that we should go on with the evidence. If there is any contradiction in the evidence, these contradictions will be discussed on the conclusion of the testimony. If the rule is to prevail, as contended for by the other side, it would lead to this result: We could take up an abstract from *Hoke v. Henderson,* and say read that; and take up some other case, and say read that; and then say, how do you think the two compare. And so we would go on from day to day comparing abstracts. Another objection is, that the evidence is in, and it is a mere attempt to get an argument before the Court before the time for argument begins. We understand that this course of examination is not according to the practice of the Court, and that the evidence is incompetent."

The PRESIDENT: "At first they wanted to read for the sake of emphasis; now they want to ask the witness if he received any other instructions from the Court, and in the question is embodied the fact that he had read the dissenting opinion of a certain Judge. I shall rule that question out. But if he has any peculiar knowledge why he issued the writ, from personal recollection, he has a right to state it."

Mr. BUSBEE: "We withdraw the question."

Q. What is the difference between an alternative and a peremptory writ of mandamus?

(Objcetion by the Managers. Objection sustained by the Chair.)

Q. Does not an alternative writ of mandamus direct the doing or not doing of a certain act, or as an alternative to show cause why it is done or not done?

This question was objected to, as a question of law.

Mr. F. H. BUSBEE: "We base that question upon the fact that this is the person who issues alternative and peremptory writs. This is the officer who issues the writs. The question is, whether the judgment of the Court below directed an alternative or a peremptory mandamus; it is contended that he ought to have issued an alternative writ, because the judgment of the Court below directed the issue of an alternative writ. It is a question of familiarity with writs by this officer. We desire to show that the judgment below was not for the issue of an alternative writ, but simply directs that a mandamus issue to W. H. Worth, State Treasurer, and to the Auditor. No one could doubt it but for an expression used in the dissenting opinion. We want to show by this expert who issues writs, that an alternative writ always contains an alternative to do a thing or show cause."

Mr. C. M. BUSBEE: "The proposition is simply this: Here a judgment has been introduced in evidence, and they desire to ask the witness, who is the Clerk of the Court, what his construction and effect of the judgment is. The judgment stands for itself, and should be construed by the Court of Impeachment."

Q. Did you ever apply to these Justices for any instructions in regard to issuing the writ, except in the matter you have stated? A. No.

Q. I understand you to say, that when you sought the advice or instructions of the Court, they had been in the habit of giving such advice and instructions as you desired? A. Yes.

Q. When you went to the hotel to see the Justices, did

they request you to come? A. No; I went of my own accord.

Q. I think you said that no Justice volunteered any statement to you in any way? A. Yes; I so stated.

Q. You went down to deliver copies of the paper left with you by Justice Clark? A. Yes; together with other opinions I had to deliver to them—other matters connected with the office.

Q. That was before you saw them in conference on the 16th? A. Yes.

Q. You went to the hotel at which they were living? A. I did.

Q. What was the substance of the conversation you had with them? A. When I first went there, I saw Judge Faircloth in his room. The second time I saw the respondents in the room of the one or the other of them. I consulted them in reference to this matter, and I have stated that the substance of what they said to me was, that they thought it the duty of the Clerk to issue the paper.

Q. Was it before or after this you received from Justice Clark advice not to issue it? A. These conversations were after that.

Q. Did not Mr. Justice Douglas read to you from a paper his views upon the subject? A. He did.

Q. I hand you a paper; state whether this paper contains the substance of what he said? A. I think so.

Mr. OSBORNE: "I ask that the witness read the paper. It is not the original."

Mr. GUTHRIE: "We object to the witness reading the paper, on the ground that it was not written by the witness, or by the counsel, or by any one we know of; and it is not the original."

The PRESIDENT: "I overrule the objection. The witness may read the paper, but only to refresh his memory."

Mr. F. H. BUSBEE: "So far as the witness is concerned, there is no original of the paper. The witness received it strictly as an oral communication; he could not identify any paper as the original. We do not ask to introduce the paper as a paper or document. I simply propose to ask the question whether or not Justice Douglas did not read to him a written statement, which the witness received by ear, not from sight. We propose to ask the witness if Justice Douglas did not deliver to him a statement which the witness did not see, but which Judge Douglas read the substance of."

Mr. WATSON: "The Court can see that the object is to submit a paper to the witness which he never read, but which Justice Douglas read, and which this witness never saw, and we do not think it competent to get in the declarations of the respondent in this way."

The PRESIDENT: "I rule that the witness may refresh his memory from the paper."

Q. What did Justice Douglas say to you on that occasion?

Mr. C. M. BUSBEE: "We object, on the ground that the paper is handed to the witness to refresh his memory, and that the paper is not permissible to be handed to the witness for that purpose, and counsel ought to know that his memory can only be refreshed by memorandum made by him."

The PRESIDENT: "I overrule you on that. He may use the paper to refresh his memory."

Mr. Manager CRAIG: "If the witness can refresh his memory by any paper the counsel on the other side send to him, suppose counsel on the other side (I will not say they would), but suppose they send him a letter to refresh his memory concerning certain facts. This paper has no higher dignity than any paper that could be sent. I say the witness can refresh his memory only from a paper written by him-

self. He can state from memory what Justice Douglas said to him, but he can only refresh his memory from a paper written by himself, and to refresh his memory from a paper sent by the counsel on the other side is clearly incompetent."

Mr. WATSON: "The paper, it is admitted, is not the original, but only a copy of the paper from which Justice Douglas read."

Mr. OSBORNE: "I told you that at first, that it was not the original; but we will produce the original."

Mr. WATSON: "They put the paper in the hands of the Clerk and then go on and ask what did he say."

Q. By Mr. COOKE: Give the substance of the communication made by Judge Douglas to you which was testified to on the direct examination. A. I have stated that the substance of that was that it was the duty of the Clerk to issue the writ, upon the opinion and judgment of the Court in that case.

Mr. F. H. BUSBEE: I now ask you if Judge Douglas told you in substance as follows: I will not read the paper unless permission is accorded?

Mr. Manager ALLEN: "We think the question is an improper one. He is proposing to put in the text of the paper and proposes to read it to the witness, and then ask him if that is not what he testifies to. If that is not putting a paper in evidence I would like to know what is."

Mr. COOKE: "How do you know he is reading from the paper?"

Mr. Manager ALLEN: "Because I see him holding it up reading it."

Mr. COOKE: "I have a right to ask any question I desire, no matter where I get it from. I can get it from an associate counsel or from any paper in the world. We are not offering the paper we are reading, and I do not think there ought to be any objection."

The PRESIDENT: "Ask the witness the question."

Q. Did not Judge Douglas make a statement to you substantially as follows: I do not think that as an individual Judge I have the right to instruct the Clerk of this Court; nor have I the individual right to authoritatively construe a decision of this Court, but I have no hesitation in saying that, in my opinion, the intent and legal effect of our judgment in *White v. Auditor* was to entitle the plaintiff to the writ of mandamus that was the object of his suit, and that it becomes the duty of the Clerk of this Court to issue such mandamus in accordance with the opinion, upon the application of the plaintiff? A. Yes; I remember the substance of what he said to me, and that it was read from a paper in his room at the Yarboro on the occasion of my visit for the purpose of consulting them about the matter.

Q. I ask you if Justice Douglas did not substantially repeat the same thing from the bench next day? A. I think so; something of that character was repeated by him.

Mr. WATSON: "We withdraw all objection to offering the paper. Let it go in."

The PRESIDENT: "The rules require that the counsel commencing the examination of a witness must conclude him."

Mr. F. H. BUSBEE: "We offer in evidence Rules 45, 47, 49, 50 and 51, of the Supreme Court."

Re-direct examination.

By Mr. GUTHRIE:

Q. Mr. Busbee handed you two papers to be compared, one a mutilated copy; you were asked to hold the papers up and compare them. When they left your office on Saturday after Judge Clark filed them with you, you had five copies manifolded on the typewriter, did you not? A. Yes.

Q. You gave a copy to Judge Clark, three to the Judges

at the Yarboro House, and sent one to Judge Montgomery? A. Yes.

Q. Please look at this and tell us whose copy it was? A. That copy was delivered to Judge Furches. I tell by the initial of his name, F., on the back of it.

Q. What is the memorandum attached in front of it? A. "At the request of Judge Clark I caused these papers to be copied and sent around." It is a printed slip; it was merely to notify the Judges that it was done by request.

Q. The copy you now hold is the one you delivered to Justice Furches? A. Yes.

Q. This one with portions stricken out was delivered to Judge Clark? A. Yes.

Q. And when it was delivered the portions were not stricken out? A. No.

Q. All were alike then? A. Yes.

Q. The portions were stricken out after you handed it to Judge Clark? A. Yes.

Q. This was filed before the final order on Tuesday evening, was it not? A. Yes; that is so. That was on the 13th and the final order was on the 16th. Your attention has been called—

The hour of 1 o'clock having arrived, the Court takes a recess until this afternoon at 3 o'clock.

Afternoon Session.

The Court of Impeachment reconvenes at 3 o'clock p. m., and Sergeant-at-Arms makes due proclamation.

The roll is called, showing forty-four Senators present, as follows:

Senators Alexander, Arrington, Broughton, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee,

Foy, Gudger, Henderson, James, Justice, Leak, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Stikeleather, Stringfield, Sugg, Thomas, Vann, Ward, Warren, Webb, Wood and Woodard.

Senator MORRISON: "Mr. President, I wanted to move that the Court now adjourn until 1 o'clock Monday. We have been engaged in arduous work for a long while. Some of us are tired and some of us are sick, and it seems to me that it would be but reasonable that we take what is left of Saturday and Sunday and go to our homes and rest a little and then come back Monday and go on with this trial. I do hope that the Senators will consent to this and allow those of us who live near here to go home to our people, and then come back Monday and go on with this trial."

The PRESIDENT: "All who favor the motion of the Senator from Richmond will rise and be counted."

Not a sufficient number rise and the motion is lost.

Mr. OSBORNE: "Before what I have to say, Captain Cook has something to say to the Court, and I ask you, gentlemen, not to press that motion for the present. I was going to state, as far as this side of the house is concerned, that we would be willing to leave this open in accordance with the motion."

The PRESIDENT: "I will state to the Senate that there is nothing before the Senate."

Senator HENDERSON: "I would like to make one motion; that when we adjourn to-day that we adjourn to meet on Monday at 12 o'clock, instead of 10 o'clock. Of course I want to test the Senators on that. I think on Monday morning we ought not to begin as early as 10 o'clock."

Mr. GUTHRIE: "Colonel Kenan, you can stand aside."

Mr. F. H. BUSBEE: One moment, Colonel Kenan.

Have you brought with you the original record in the case of *Garner v. Worth?* A. Yes; I have it.

Senator HENDERSON: "Mr. President, I now send forward that resolution."

The resolution fails to pass.

Mr. COOK: "Mr. President, in behalf of the respondents we submit the following motion:

"*Resolved,* That the deposition of Hon. W. P. Bynum may be taken on Tuesday next in Charlotte, N. C., on behalf of the respondents, and that the Managers may be present by counsel to cross-examine him, and that such deposition when offered before the Court of Impeachment shall be subject to all legal exceptions, except as to notice."

Senator HENDERSON: "Mr. President, I have no objection to the order being made, but I hope it will be understood that the question of competency of expert testimony is to be raised hereafter, and it will be subject to whatever may be the decision in that record."

Senator JUSTICE: "I move that the order for the deposition be issued."

Mr. GUTHRIE: "Does the Court pass upon and rule out anything that is not competent?"

Mr. Manager ROUNTREE: "There is another resolution that we would like to offer in this matter. Depositions are not competent testimony. I would like to raise that question when the evidence is presented."

Mr. C. M. BUSBEE: "We waive nothing at all."

Mr. GUTHRIE: "May it please the Court, we don't want to be understood as waiving anything."

Mr. COOK: "Since the attorneys for the prosecution have advised us that they will not waive anything, we ask

the Court to fix the time when the deposition shall be taken, and we ask that some hour next Tuesday be set when it will be convenient to them. We leave to the President of this Court the naming of a person to do this in Charlotte. I will say this, Mr. President, that we had hoped he would be able to attend this trial, until we received a letter by yesterday afternoon's mail saying it would be impossible to come here."

Mr. C. M. BUSBEE: "I desire to be very well understood. So far as we are concerned, we waive nothing in regard to taking that deposition. As I understand it, no deposition can be taken after the term of Court begins. We shall insist upon this."

Mr. WATSON: "I have in my possession, Mr. President, a letter from Judge Bynum, written at least a week ago, in which he said he would not be able to attend the trial; that he did not know on which side he was subpœnaed, but he hoped arrangements would be made to take his deposition."

Mr. COOK: "I do not know that we will be held responsible for the condition of Judge Bynum's health a week ago. We were also advised a week ago, when we had thought that the trial would begin last Monday. He said he was in such a condition then that he would not be able to come to Raleigh, and it was only by the mail of yesterday that we learned he could not come to the trial. I would call your attention, Mr. President, and the members of this Court, to the fact that after the issue was joined in this case, there would not have been time for us to have taken this deposition. It may be conceded, for the sake of argument, that depositions are not allowed in impeachment trials. Now, so far as North Carolina is concerned, that law has been changed; it has been changed in favor of the defense, and a deposition is allowed to be taken. We had thought, follow-

ing the authorities, that the practice in the Court in criminal trials should govern in this trial, and that would all come up when we offer the depositions. What we desire this Court to do, is that they shall make this order appointing a person to take this deposition and to take it on Tuesday next. We could not make this request, except before this Senate sitting as a Court, and this is the first time we have had an opportunity to do so."

The PRESIDENT: "It is a matter with the Court, and I am of the opinion that the Chair can make no order about it."

Senator HENDERSON: "I will offer the following resolution:

"*Resolved,* That the deposition of Hon. W. P. Bynum may be taken on Tuesday next, in Charlotte, N. C., on behalf of the respondents, and that the Managers may be present by counsel to cross-examine him, and that such deposition when read before the Court of Impeachment shall be subject to all legal exceptions, except as to notice.' "

Senator LONDON: "I would suggest, Mr. President, that the word 'offered' be used, instead of 'read.'

Senator HENDERSON: "I accept this amendment."

The PRESIDENT: "As many as favor this resolution will answer in the affirmative when their names are called; as many as opposed in the negative. The Clerk will call the roll.

The resolution is adopted, ayes forty-four, noes none, as follows:

Those voting in the affirmative are: Senators Alexander, Arrington, Broughton, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Gudger, Henderson, James, Justice, Leak, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell;

Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Stikeleather, Stringfield, Sugg, Thomas, Vann, Ward, Warren, Webb, Wood and Woodard.

Senator HENDERSON: "Mr. President, I suppose the motion is carried. The first thing for the Managers and counsel for the defense to do is for the mto agree upon the commissioner."

The PRESIDENT: "You can prepare the form of commission and I will sign it for them."

Mr. OSBORNE: "Counsel for the respondents, may it please your honor, suggest the name of Charles W. Tillett, of Charlotte."

Mr. WATSON: "Entirely satisfactory."

Mr. GUTHRIE: "Mr. B. R. Lacy will please take the stand."

Q. Mr. Lacy, what office do you hold? A. I am public Treasurer of the State of North Carolina.

Q. Have you in your possession the warrant drawn by Hal W. Ayer, State Auditor, upon the Treasurer, dated October 20, 1900? A. Yes; I have it.

Q. Please produce it and read it?

Mr. Lacy read the warrant as follows:

No. 22962. RALEIGH, N. C., October 20, 1900.

STATE OF NORTH CAROLINA—AUDITOR'S DEPARTMENT.

The State Treasurer will pay to Theophilus White, C. I. S. F. C., or J. C. L. Harris, attorney, or order, eight hundred and thirty-one dollars and fifteen cents, for salary as Shell-Fish Commissioner.

(Signed) H. W. AYER,
State Auditor.
R. C. RIVERS,
Chief Clerk.

September 1, 1900.

Q. Is not there something else on it? A. Chapter 19, sections 1 and 2, Laws 1899, Supreme Court decision February Term, 1900.

Q. How is it endorsed? A. It is endorsed—

Mr. LONG: Do you know the handwriting appended to the warrant? Do you know the signature to that voucher? A. Yes; I think this is written by Mr. Rivers. He countersigned it for Mr. Ayer and signed it as Chief Clerk. I don't think that is Mr. Ayer's handwriting. I would not be willing to swear that this is the handwriting of Rivers. Mr. Ayer's signature is here, but I don't know that it is his.

Mr. LONG: "We think it is improper to offer it."

Mr. GUTHRIE: When did you take charge of the Treasurer's office? A. The 16th day of January, 1901.

Q. Did you find that among the records of your office? A. Yes; among the vouchers of the former Treasurer.

Q. Did you know the fact that Mr. Rivers was Chief Clerk of the Auditor's office for the last three years? A. Yes; I know the man personally.

Mr. LONG: "Don't read anything on the paper until it is ruled in."

Mr. C. M. BUSBEE: Is that one of the official records of the office of State Treasurer? A. Yes.

Mr. LONG: Mr. Lacy, where does Mr. Rivers reside? A. He lives in the city of Raleigh.

Q. He was the Chief Clerk referred to as signing that paper? A. Yes.

Q. That paper, you say, was found in your office in January, when you went in as Treasurer; you did not pay the paper? A. No, sir.

Q. You don't know who put it there; you don't know of your own knowledge when it got there? No, sir.

Q. And Mr. Rivers lives in this city? Yes, sir.

Mr. WATSON: "We submit, Mr. President, that it is properly proven."

Mr. LONG: "If the Court pleases, when this instrument is offered, it is proper to prove it by the party who signed it

for Mr. Ayer, or at least some one who can identify the signature of Mr. Ayer. The witness swears he does not know the signature of his Chief Clerk, who has signed the name of Mr. Ayer to the voucher. The point I make is this, that the paper has not been identified. It has been traced to the files of the office, but who put it there, and under what circumstances, is not in evidence, and we have the facts in evidence that the man who signed that is a resident of this city."

Senator LONDON: "I don't like to interrupt the counsel, but the Chair has ruled on this decision."

Mr. LONG: "I am addressing the Court on the admissibility of this evidence. I was only asking the Court, the President, to hear my views about this matter before this record was ruled in, and I take it for granted that the President would at least hear the grounds of my objection. I do insist then, as the President says he is willing to hear me, that when a record is offered here and the custodian can be found, and its identity can be shown, it should be shown in the proper way. I don't think, upon reflection, that the President will hesitate to sustain this. Suppose this was a note; how would it be proven? It would be proven by the man who signed the note. And that is not what has been done here."

The PRESIDENT: "I think the evidence is competent, for the reason that it is the records of a public office, found in the files of that office."

Mr. C. M. BUSBEE: "Read the endorsements on the back of the warrant."

Mr. LACY: "Theophilus White, C. I. S. F. C." That is all the endorsement on the back.

Mr. GUTHRIE: "This is the original paper and belongs in the Treasurer's office. On page 8 of the Articles of Impeachment there is set out a copy of the warrant, except as to the stamp and endorsement, Theophilus White, so I will ask

leave of the Court to let Mr. Lacy keep the original and substitute a copy in evidence. The paper belongs to the records in his office.

"The next piece of evidence we offer is resolution of June 14, 1900, which is published in the Public Laws of the adjourned session of the Legislature of 1900."

Mr. OSBORNE: "Wait one moment, I want to consult with the attorneys in regard to that evidence."

Mr. GUTHRIE: "We call the attention of the Court to chapter 13, of the Public Laws of 1897, being an act to provide for and promote the oyster industry of North Carolina. I also call the attention of the Court to the following chapter of the Public Laws of 1899, chapter 19, entitled, 'An Act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina.' Also chapter 18, entitled, 'An Act to amend chapter 13 of the Laws of 1897, entitled, 'An Act to provide for and promote the oyster industry of North Carolina, ratified 23d day of February, 1897.' Also, chapter 21: A supplemental act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina, and ratified on March 2d, 1899. We don't offer this in evidence, but simply call attention of the Court to it."

Mr. WATSON: "We give notice also that we will use the oyster laws for the past ten years, the Public Laws."

Dr. B. F. DIXON, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Mr. GUTHRIE: Dr. Dixon, what office do you hold? A. State Auditor of North Carolina.

Q. Please produce any papers that you may have in connection with this warrant that has just been read, *Theophilus White v. The State.* A. I have some papers here, do you want me to read them?

Q. When did you take charge of the Auditor's office? A. On the 16th of January. H. W. Ayer was my predecessor.

Mr. GUTHRIE: "We offer those papers in evidence."

Mr. COOK: "We object, Mr. President. These Judges have been brought before the bar of this Senate with charges preferred against them in respect to a judgment which they made and on certain opinions which they gave. Now, it was because of a judgment saying that White was entitled to his office. Why are they responsible for the execution of the writ afterwards, or the issuing of the warrant by the Auditor? If there is anything in those papers which are obnoxious we would not be responsible for it. The writ of mandamus was directed to the Auditor and he was directed to do a certain thing. Now, we may concede that the order of mandamus is competent, but any papers accompanying it, unless they are connected with these respondents in some way or other, we submit that this Court should not put them here as against them in this trial."

The PRESIDENT: "I don't know anything about what is in the papers."

Mr. GUTHRIE: "We expect to show by this evidence that the Auditor did exactly what the Court required him to do; that he received the claims of Theophilus White, and that upon those claims being received, he issued this warrant which has been offered in evidence. The respondents say in their answer they are informed and believe that the warrant was issued and paid, but under what circumstances they don't know, and they really ought to thank us for showing them how it was done. They say on page 2 of Article I, 'The respondents have no personal knowledge of the issuance of the warrant by the Auditor, and of the payment thereof by the Treasurer, but have been informed and believe that such warrant was issued and paid, but when and under what circumstances the respondents have no definite knowledge.' Now, we simply want to show by this officer that he succeeded the former Auditor, and that he found in the office

these papers, the papers upon which the claims were audited, the papers that the witness has identified. I will pass them up to the Court and let your Honor see just what they are."

The PRESIDENT: "I believe you have it in the record that the Supreme Court ordered them to do this, and now you want a record of his auditing."

Mr. OSBORNE: "If I understand, what these Judges are to be impeached for is what they did, and they can not be made impeachable for what somebody else done. They issued a mandamus. If they are impeachable at all, it is because they ordered a mandamus to be issued by a Clerk. What have we got to do with what the Auditor did? The crime if committed, was done before these papers were made out. How would it affect Judge Furches or Judge Douglas; what difference does it make whether White came and presented an unjust claim or not? Why make Judge Furches and Judge Douglas impeachable because they issued an order. I propose to argue before this Court that this decision was rendered according to the law of the land, and I propose to maintain an order of not guilty."

Mr. WATSON: "Mr. President, we are not discussing at this moment the question of high treason. We will do that hereafter; that is a later question. The question now is as to the admissibility of this testimony. We say that this claim filed with the Auditor is a claim that White had when he moved the Court for a writ of mandamus. It is such a claim as they ordered to be paid by peremptory writ of mandamus under pains and penalties; that they had a right to understand and know what kind of claim this was. We say that it follows that opinion to the letter, as near as it could follow that opinion. We say that the order made was not an order authorized by law. It was an order impossible to comply with on the part of the Auditor, because the statute law had been changed, changed in such a way as to make

it impossible to make this proof before the Auditor. The papers themselves show that it was a discretionary act on the part of the Auditor, and that the Court was compelled to know at the time it made the order, that they were compelling the Auditor to perform a discretionary act that could not be done by a court in North Carolina, and exactly in accordance with the judgment of this Court. This claim was filed, passed upon by the Auditor, and paid out of the money of the Treasury, and it is an official paper found there by the Auditor; it is a paper that Mr. Harris has testified that he audited."

Mr. BYNUM: "Mr. President, I desire to say only a few words in the discussion of this question. It is not contended here by the counsel on the other side that the papers offered in evidence were ever seen by the respondents, with the exception of the copy of the writ, which is attached, and that is already in evidence. The papers offered have never been seen or examined by the respondents. Now, the proposition involved in this testimony is to hold these respondents responsible before this high court for the manner in which Mr. White made out his accounts, and for any irregularity which the Auditor may have made in issuing these warrants. The opinion of the Court in the case of *White v. The Auditor* expressly says how these accounts shall be made out. I desire to call the attention of this Court to it. These respondents are liable for what they did, for what was before them, and not for what took place afterwards, and of which they knew nothing. 'The certificate was required to be issued by the Clerk of the present Board and countersigned by plaintiff, White, and the Auditor's warrant was to be issued upon that certificate.' That is to say, that in the opinion of the Supreme Court of North Carolina, filed in that case, Theophilus White was occupying and filling the place as Chairman of the Board of Com-

missioners, and the act provides that there shall be a secretary of that Board, and they ordered that this certificate should be certified by the chairman of that Board. Now, that was their decision; that is what they are responsible for."

"Now, sir, after that judgment had been rendered, filed as a part of the records of the Supreme Court of North Carolina, after two and one-half months had elapsed, these respondents can not be made responsible for what occurred. Why? Because, may it please you, Mr. President and Senators, that is a matter with which the respondents had nothing to do. They had disposed of the case before them, they had issued their order, they had directed how this thing should be done. Then, if the Auditor and Treasurer did not carry out their instructions, how can these Judges be held responsible for it? We submit that this is a valid objection. If Mr. White did not present his accounts to the Auditor made out in the proper way, then the Auditor would be responsible, and not the Judges; the Treasurer would be responsible, and not the Judges.

Mr. C. M. BUSBEE: "There is another view in which this evidence is competent. These respondents have denied the averment in one of the Articles of Impeachment: 'That said writs of mandamus were not issued in conformity to law, nor according to the orderly course and practice of the Courts.'

"I take it, and we shall maintain in this behalf, that unless the amount is fixed by the judgment, no peremptory mandamus is issuable, and we propose to show by this evidence that it requires a calculation upon the part of the Auditor in order to ascertain the amount this man should receive, and that that goes to sustain the evidence, which appears from the face of the writ of mandamus itself, that it was not specific or definite, but the amount was left open for future inquiry and future determination and future calculation.

"We think that this evidence goes to sustain that averment in the fourth Article of Impeachment."

Mr. WATSON: "It appears in this case that the judgment of the Court below only ascertained the amount due to Theophilus White from the 20th day of March, 1899, to the 20th day of November, 1899; that was affirmed. We say that was all that the Court could do. But when it came to hear this case the next spring and filed this opinion, that it gave a judgment going beyond the point at which Judge Starbuck had ordered, and that it ordered the Treasurer and Auditor to pay to Theophilus White a greater amount, that left it altogether uncertain as to how much. It provided that it should pay him four hundred dollars a year, all necessary travelling expenses, according to the voucher filed, and an amount in excess of that not exceeding fifty dollars. This claim was in the pocket of the counsel for the plaintiff when they moved for mandamus. They made an order on the Auditor to settle that account yourself, make your calculations, make it upon the basis of $400.00 a year ,and actual travelling expenses. The law says he had a right to swear him as to that. We have no evidence that the Court did read this claim in the Auditor's hands. The Court ought to have read it, ought to have asked for it, and if they gave the order to the Auditor, they are responsible for that paper. It is certified by Colonel Kenan, and it is a record of this Court, and the Court ought to be able to see and pass upon this paper."

The PRESIDENT: "I am of opinion that it is admissible when you lay the proper foundation. I don't think you have done that so far, as you did in the case of Mr. Lacy. It does not appear where you found this evidence."

Mr. GUTHRIE: "Dr. Dixon, these papers were found in your office among the records of the Auditor's office, and they are official papers? A. Yes.

The PRESIDENT: "I think the evidence is competent."

Mr. GUTHRIE: "We will offer the evidence without reading."

Mr. OSBORNE: "Does the Court fully comprehend our position?"

The PRESIDENT: "Yes."

Mr. OSBORNE: "My friend, Mr. Watson, called my attention to the fact that I was discussing the main features of the case too soon. I ought to say the same of him, for he followed my example while reproving me."

"Your Honor understands us, we maintain the proposition that if these Judges are impeachable for anything, it is for the order they issued. Now, as to what was done with that order they are in no way responsible. Before they introduce the evidence, we would like to hear the testimony connecting them with it. This is the kind of court where you can not instruct jurors. A Superior Court Judge could say: "I admit this evidence conditionally that they connect it with the defendants by some kind of testimony. And if that connection is not made, I charge the jury not to consider it. Your Honor does not charge this Senate."

Mr. F. H. BUSBEE: "Until they show that the respondents saw any part of the Auditor's works, that the respondents were connected with it, that they advised anything that was connected with it, that what the Auditor did can not be charged to these Judges. If the Auditor acted illegally, then the Auditor would be responsible. Our view is, that the respondents, if liable at all, are liable for their direction of the writs of mandamus, and further whether that was carried out certainly can not be proven by that evidence. We would prefer a vote of the Senate upon it."

Mr. WATSON: "We say the respondents are already connected. They said, in their opinion, that they could not

follow the statute. They, therefore, ought to make the best order they could, and they put in force this order that resulted in that claim being audited. They are just as much connected with it, and just as much responsible for it, not that we are trying to show by that that the Auditor violated the Auditor's report, but that it was an unlawful order. The courts say this. So if this discussion as to the manner of issuing the warrant can be complied with, it should be complied with as near as may be; that is, the certificate should be issued by the Clerk of the present Board and countersigned by the chairman. There was no chairman; there had been no Board before. The authority for him to act as chairman had been swept away by the order of the Court, then they are just as much responsible for what took place in the Auditor's and Treasurer's offices as the Southern Railway would be responsible for a collision of an engine at Cary which was turned a loose at Raleigh, knowing there was a train on the crossing at Cary. They put the machinery in motion that resulted in the auditing of that account and its final payment. And, as is suggested by one of the honorable Managers, this very fact was called to the attention of the Court at the time that the order was made, before the judgment was signed, by Justice Montgomery, in his dissentnig opinion. And, in answer to that, the Justice who wrote the opinion, said: 'While we can not obey it in full, we will obey it as far as can be.' That phrase that has caused so much trouble in times past. They did know."

Mr. OSBORNE: "As I understood your Honor, you ruled this in on the idea that hereafter it might be connected by some sort of testimony by the respondents?"

The PRESIDENT: "I hold it as admissable evidence."

Mr. OSBORNE: "I know that, sir, but when it comes to the question of evidence—I was just going to ask the prosecution on the other side, do they propose to introduce

any evidence afterwards, and I thought, your Honor, that up to this time they had not connected it. That being so, then it would be absolutely incompetent."

The PRESIDENT: "Without a call for a division, I will give order for the Court."

Mr. OSBORNE: "I don't know, sir, the proprieties of the occasion. I wish to comply with them. I don't know whether counsel has a right to address himself to the Senate."

The PRESIDENT: "I suppose some Senator will call for a division."

Senator WARD: "I will call for a division, Mr. President, without giving any intimation of my opinion on it."

"Senator HENDERSON: "Mr. President, before that is to be done, I would like to know how anybody could vote against sustaining the Chair. It looks to me like a mere idle ceremony, unless there are some grounds for it. Still I am perfectly willing."

Mr. OSBORNE: "It seems to me that I have made myself as clear as I could. This does not require any explanation to me. Now it does not require the slightest illustration, to my mind, to make this point of law clear to the lawyers of this Senate, and to any man who has ever been inside of a court-house in a criminal court. What are they seeking to do? They are seeking to prove, at the very utmost, that H. W. Ayer, Auditor of the State, issued a warrant upon the Treasury, and that the money was paid out upon that order; they are trying to connect my clients with this transaction. How does that affect them? What Hal Ayer does or what the Treasurer does in pursuance of any order that they have given does not affect them. Suppose he had issued no warrants, how would it help us? Suppose he had issued a warrant, would we be bound? Suppose the Treasurer had refused to pay the money on the

warrant, would it protect us? If we are guilty at all, are we not guilty for issue of mandamus? That is the last link in the chain, and what difference does it make whether Ayer issued the warrant, or what he did. He can not make my clients guilty, nor can he make them innocent. As to what the Auditor did, or what the Treasurer did, we have nothing to do with it.

"The counsel say it does not make a particle of difference, because their guilt or innocence is complete; they are either guilty or not guilty when they make the order; that is the question. But they will trust to you. They are not going to rise here and claim before you for one moment that Judge Furches or Judge Douglas are guilty on account of anything Hal Ayer did. They are going to stand before this Senate and argue that the respondents are responsible for what they did in their office, and not for what other people did. No use to talk to me about that. They are too just and upright men to argue that these gentlemen are guilty for anything that may have followed the order. I regret very much to differ with the Court, but this question must be decided by law, and so I respectfully appeal to the Senators. I hope I make myself clear. It is clear to my mind as a legal proposition. Now, without referring to anything else, I know my friends will not take advantage of me; I know they would submit these papers to me. I am informed there is a letter, one or two, I don't know how many, among the papers. I care nothing about those papers. How does it affect this matter?"

Mr. C. M. BUSBEE: "I don't know, Mr. President, that it is necessary for us to say anything, but I will say this, in answer to the illustration that my friend, Mr. Osborne, has just put, that these respondents can not be guilty for what followed the issuance of these writs of mandamus. There is a very great difference, very clear distinction, and a serious

one, where a man puts poison in a well and no one drinks the water, and where a man puts poison in a well and a man drinks it and dies."

Mr. WATSON: "I submit that we are not confined to the issuing of the order alone, but that we are entitled to show the circumstances in which that order necessarily had to be filled. If the Yarboro Hotel on Fayetteville street was located in the woods, and its proprietors said to a servant, 'Go heave a box of bricks out of that window,' and unexpectedly they had fallen on some one who had been passing, it would be an accident. But suppose the proprietor of this hotel, knowing that there is a crowd surging along the sidewalk, and the bricks are thrown and some one is killed, is it said that they are not guilty of homicide? It is the circumstance which the Court knew would have to be complied with, and they exercised sufficient and discretionary powers in order that the Treasurer might not be long in paying it."

Mr. OSBORNE: "How do we know that? That paper don't help you there."

Mr. WATSON: "There was a motion made that there was nothing more to do but to go before the Court and say: 'My client has a claim; he wants me to help him collect it.' The Court says, 'Let us see your claim and see if I can collect it by writ of mandamus.' They can not be heard to come here now and say that their responsibility ended with the issuance of that mandamus; they have got to follow it. We have proven the payment without objection; we have proven the warrant of the Auditor without objection, but under the rule of the Court we are gonig to show the evidence of it."

Mr. PATTERSON: "Were there not allegations that they were made out irregularly or fraudulently?"

Mr. WATSON: "We are going to show they were made out in a way that he could not sign them as Shell-Fish Com-

missioner, because there was no such office. We propose to show that, not knowing how to sign, he signed both ways."

Mr. BYNUM: "It does seem to me that this question is misunderstood here. It affects our clients in a very serious way, and we feel that our brethren on the other side are in error. My friend, Mr. Watson, has stated to the Court that White could not sign his accounts as Chairman of the Shell-Fish Commission, because he did not hold any such office; that the name had been changed from Chief Inspector to that of Chairman of the Board of Shell-Fish Commission, by chapter 19, Laws of 1899."

Mr. WATSON: "Do you know we are going to attack that decision?"

Mr. BYNUM: "Yes; this paper does not affect your attack at all. It is not necessary to the prosecution here and your claim before the Senate that White did not occupy the position of Chairman of the Shell-Fish Commission. The Supreme Court held that the effect of chapter 19, Laws of 1899, was to change the office of Chief Inspector to that of Chairman of the Board of Shell-Fish Commission, and that White was entitled to the office. Now, that is perfectly plain. So that, Senators, Theophilus White, at the time this mandamus was issued, was filling an office which was entitled 'Chairman of the Board of Shell-Fish Commission.' The Supreme Court had expressly decided that. Now, then, is it not perfectly plain that when the Court here, in *White v. Auditor*, directs that the Auditor of the State shall issue his warrant upon the certificate signed by the Secretary of the Board and countersigned by the chairman of the Board; that it was an instruction to White that they should be thus signed and thus countersigned. Now, is not that true? We have heard the opinion of the Court in which that language is expressly used. I want to call your attention to chapter 19, section 9. Says Judge Furches, in this opinion:

'This shall be done upon the warrant of the Auditor, which warrant shall be issued by the Auditor upon the certificate of the Secretary of said Board, and countersigned by the Chairman of the Shell-Fish Commission.' I am quoting now from the statute: 'That the warrant shall be issued by the Auditor upon the certificate of the Secretary of said Board, and countersigned by the Chairman of the Shell-Fish Commission.' I don't remember the names of the other commissioners. The question is whether White was acting on that Board."

Mr. C. M. BUSBEE: "Is it your contention, Mr. Bynum, that those commissioners are still in office?"

Mr. BYNUM: "The question before the Court was whether White was the Chairman of the Board of Commissioners. If entitled to that office, under that name, the Court directs, in its opinion, that the Auditor shall issue his warrant when signed by the secretary and countersigned by the chairman. These papers that are offered here now are papers containing an account that Theophilus White made up. Whether they are signed by him as Chief Inspector or as Chairman of the Board can not affect these respondents. They had acted in conformity with the law when they directed the certificate to be presented, signed and countersigned. That is our position. They had directed them, and that direction being in accordance with the Laws of 1899, then if the Auditor failed to issue his warrant, as the Court had directed, then the Auditor is to blame, and not the Court. Now, I trust that I make myself plain upon that. The Court had done all that they could do, when they directed the certificate to be presented, signed and countersigned, as required by the act."

Senator HENDERSON: "I am sure that I would like to hear that judgment read in full, and I would like to hear the mandamus that was issued before the Supreme Court."

Mr. BYNUM: "I have that here before me. I will

first read the mandamus writ that was issued to the Auditor. No; I will read first the judgment that the Court rendered in the case of *White v. Auditor,* page 19, of the Answer: 'This cause coming on to be heard, it is adjudged that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899, chapter 19, to-wit, the sum of four hundred dollars per annum, and five cents per mile travel, when engaged in his work, and extra expenses, not to exceed fifty dollars per annum, and that the same be paid by the Treasurer of the State out of the oyster fund appropriated by the Act of 1897, and the Act of 1899, admitted to be now in the Treasurer's hands: *Provided, however,* That the expenses of the Commission do not exceed the sum of six thousand dollars per annum.

"It is further adjudged that the certificate and warrant shall be issued in the manner indicated in the opinion filed in this action, and that the defendant pay the costs of appeal.'

"I now read the writ of mandamus; I have it here:

'*The State of North Carolina to Hal W. Ayer, State Auditor—Greeting:*

'This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to issue; from which judgment the defendants appealed to this Court, where the judgment of the Court below was modified in the amount of the recovery, and, as modified, the judgment of the Court below was affirmed; and that the said judgment, as modified and affirmed, entitled the plaintiff to a salary of four hundred dollars per annum, as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile traveled when engaged in the business of said commission, and for other extra expenses, not to exceed fifty dollars per annum, whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the Court that the defendant, Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified by the Secretary of the Board of Shell-Fish Commission, and countersigned by the Chairman of the Shell-Fish Commission.

'Now, therefore, you are hereby commanded, absolutely and peremptorily, without delay, to proceed to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as you shall find to be due the plaintiff thereon; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.'

"Now; I submit, Senators, that here these Judges followed strictly chapter 19, of the Laws of 1899, in directing this writ. They simply directed the Auditor to audit the claims and issue the warrants upon their being signed and countersigned, and issue them for whatever amounts the Auditor shall find to be due."

Senator WOODARD: "You define the duties of an officer as ministerial."

Mr. BYNUM: "Yes; we contend that his duties in this instance were merely ministerial. In the first place, we shall contend that that was a specific appropriation; that that appropriation was in the hands of the Treasurer as admitted in the case agreed; that the Treasurer had in his hands an amount available, and that the Acts of 1897 and 1899 had placed that fund in his hands, and had expressly directed him to pay all claims arising out of the oyster industry, and the payment of it by an officer was simply a ministerial duty.

"Now, that is all that I have to say; I wanted to omit nothing on our part, in order that we might make this plain to the Senate. We contend that the respondents ought not to be held responsible if the Auditor issued warrants contrary to the direction of the Court."

Mr. OSBORNE: "I believe it is generally conceded in this country that no man can be tried for anything that he was not indicted for, and I believe that no man can be impeached for anything not mentioned in the articles. I now read Article I of the Articles of Impeachment: 'That at the time hereafter named, to-wit, on or about the 17th day of October, A. D. 1900, at and in the city of Raleigh, the

said David M. Furches, now Chief Justice, who was then an Associate Justice of the Supreme Court of North Carolina, and the said Robert M. Douglas, who was then, and is now, an Associate Justice of the Supreme Court of North Carolina, and one other member of the said Supreme Court of North Carolina, now deceased, concurring therein, constituting a majority of said Supreme Court of North Carolina, unmindful of the high duties of their offices, of their oaths of office, and unmindful of the Constitution of the State of North Carolina, and especially Article I, section 8. 'The legislative, executive, and supreme judicial powers of the government ought to be forever separate and distinct from each other.' "

Mr. BYNUM: "I will give you my summary of this Article. All that that Article relates to is the issuing of the mandamus, on the 17th of October. That mandamus is held to be issued in violation of the third section of the Constitution. Section 9, Article IV, provides: 'The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action.'

"Article XIV, section 3, provides: 'No money shall be drawn from the Treasury but in consequence of appropriations made by law.'

"Now, that is the sum and substance of Article I, but you can see, Senators, that that Article does not specify in what particulars we violated any of these Articles of the Constitution. Beginning on page 5, you will see where it describes the mandamus; then look on page 6, there you see: 'State of North Carolina to W. H. Worth, State Treasurer—Greeting.'

"Look on page 8, you will see that the State Treasurer will pay Theophilus White, C. I. S. F. C., or J. C. L. Harris, at-

torney, or order, eight hundred and thirty-one and 15-100 dollars for salary as Chief Inspector of Shell-Fish Commission, compensation for extra services and mileage from March 20, 1899, to September 1, 1900; charge account Shell-Fish Commission. You will all recollect the paper; then why are these respondents guilty of high crimes and misdemeanors? Where do you find the least mention there of that warrant that you are trying to introduce now? Therefore, I say to you, that it is a well-known principle in criminal law that no man shall be guilty unless there is some specification, and there is no such specification here."

Mr. POU: "Mr. President and Senators, we ask you, Senators, to admit this testimony. We do not hold the respondents responsible for anything that was done by any other person than by themselves, unless done under compulsion by the Judges. Now, let us see what was the situation. Last Spring the Supreme Court had rendered a decision that a certain amount of money was due Theophilus White. In that decision they said that it was almost impossible, as the machinery for drawing that money in that manner did not then exist, but their judgment went on to say that if that money could not be drawn in accordance with the law, then it should be drawn out in the way that bore the greatest similitude to the legal method. But the money staid in the treasury for awhile; the Supreme Court had taken a recess, and the money lay in the treasury. In October Mr. Harris made a motion. He tells you that he enquired of the Auditor and Treasurer, and they said: 'We will not pay that money unless the Supreme Court issues a peremptory mandamus upon us.' After some controversy, the order is issued. Is it issued in the ordinary way to the Auditor to pass upon the claim? Not at all, but they take away the discretion from the Auditor. They say pay him upon the basis of four hundred dollars a year, and what discretion did that leave to the Auditor? Nothing, Senators, except to ascer-

tain the number of miles that he had travelled. Are they not responsible for what they compel the Auditor to do? Did they stop there? They sent another mandamus to the Treasurer, ordering him peremptorily, and without delay, to pay whatever warrant the Auditor issued. And that was before the warrant was issued. Now, can they be heard to say that they are not responsible for the consequences of those orders? The officers had said to them, we will not do the acts unless you compel us. The Supreme Court says: 'Do those acts or go to jail.' Now they say they are not responsible for what the Auditor and Treasurer did. Yesterday it looked like as if the Court had committed a sin it was to be placed upon the shoulders of my friend here, and that Colonel Kenan was to be the scape-goat, and driven out in the wilderness. Now it seems that Worth and Ayer are to be the ones. Now, Senators, we ask you to admit this testimony. We think, gentlemen, that every act that these officers did—which they would not have done without it, but which they did under the order of the Court—are acts for which respondents are answerable. They are the necessary result, they are the products of the machinery started by the order of the Court, and you can not understand this case until you have seen the sort of an order patched up. The Supreme Court says, If you can not follow the order, do the best you can, but pay the money. I ask you to admit this testimony, to show you how far they were from complying with the law. Judge Bynum says, that Mr. White was Chairman of the Board. He says he supposes he was Chairman of the Board that was appointed by the Legislature of 1899. Let me refer to the decision, here it is. This is in evidence:

'*The State of North Carolina—To the Sheriff of Pamlico County:*

'You are hereby commanded to summons George H Hill, J. M. Clayton, Daniel D. Hooker, C. C. Allen, B. D. Scarborough, Daniel L. Roberts, Robert W. Wallace—'

And they are the men against whom a judgment was rendered at the Spring Term, to remove them from office. *White v. Hill*, 194. And the Court had decided that the duties had not devolved upon those seven men, but the Court ousted them from office. They changed the name, and White remained Chairman of the Board, without a Board. They abolished the Board, and, after abolishing it, made him Chairman of the Board, appointing his own clerk. We ask you, Senators, to admit the testimony."

Senator JUSTICE: "Before the testimony is allowed, I would like to ask the Auditor about the papers."

Mr. GUTHRIE: Q. Dr. Dixon, where did you find these papers? A. In the iron safe in my office. They were among the other records of that office. I found them among other claims against the State.

Senator HENDERSON: "Before the Senate is asked to vote on this question, I would like to understand one thing that has not been made plain to me. That is, without regard to whether the Supreme Court could issue the writ of mandamus, that why it was that a writ of mandamus was issued before the claim was ascertained by same Court. Here is the trouble the Senators will be in. Here is a mandamus issued on the Auditor and Treasurer, ordering them to issue a claim, leaving it to the Auditor and Treasurer to settle it. If the question is to simply sustain the Chair, until something further is shown I will be bound to sustain the Chair. It seems to me that we are bound to admit the paper that passed through the Auditor and Treasurer's hands."

The PRESIDENT: "I would like to call the attention of the Senators to Rule 13: 'All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one-half hour on each side, unless the Senate shall, by order, extend the time.' "

Senator HENDERSON: "This is a very important matter. I hope it will be waived for the present. I will make a motion in writing to suspend the rules."

Senator WOODARD: "I move that we suspend the rules and extend the time."

The PRESIDENT: "As many as second the motion to extend the time to twenty minutes longer, will rise—sufficient number is up. All who are in favor of extending the time will answer in the affirmative, when their name is called, all opposed in the negative. The Clerk will call the roll."

The roll-call shows, 19 in the affirmative, and 24 in the negative. Those voting in the affirmative are: Senators Alexander, Arrington, Buchanan, Candler, Crisp, Foushee, Henderson, Lindsay, Long, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Robeson, Thomas, Vann, Wood and Woodard.

Those voting in the negative are: Senators Bray, Broughton, Burroughs, Calvert, Currie, Dula, Foy, Gudger, James, Justice, Leak, McAllister, Miller of Pamlico, Morrison, Morton, Pinnix, Smith, Strikeleather, Stringfield, Sugg, Travis, Ward, Warren and Webb.

The PRESIDENT: "The motion is lost. As many as will second the motion of the Senator from Washington, for a division, will rise—sufficient number is up.

"Senators, you who are of the opinion that the proposed evidence is admissible will, as your names are called, answer aye, those of opinion the evidence is not admissible will answer no. The Clerk will call the roll."

The roll-call shows thirty-six ayes and five noes. Those voting in the affirmative, are: Senators Alexander, Arrington, Bray, Broughton, Burroughs, Calvert, Currie, Foushee, Foy, Gudger, Henderson, James, Justice, Leak, Lindsay, Long, McAllister, McIntyre, McNeill, Miller of

Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Smith, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

Those voting in the negative are: Senators Buchanan, Crisp, Dula, Marshall and Robeson.

Mr. GUTHRIE: "Mr. President, we now offer the papers in evidence. Unless it is desirable that they should be read we will not read them, as it will take some time to do so. One copy is the mandamus writ served upon the Auditor, and the other is in regard to accounts. We will read the papers if they object to their not being read."

Mr. JARVIS: "Do you propose to have them printed? I suppose all the evidence will be printed, and these papers will be printed as a part of it, and we will have the benefit of them before the argument begins."

The PRESIDENT: "Yes."

Senator HENDERSON: "I want to state that the Senators don't care to have them read."

Senator TRAVIS: "I would ask that they be read."

Mr. WATSON: "The tabulated statement of accounts is dated September 1, 1900,and foots up six hundred and thirty-one dollars and fifteen cents, and is signed by Theophilus White, by J. C. L. Harris, his attorney. On the same date is one of the vouchers, September 1, 1900, salary as Chief Inspector," etc., etc.

EXHIBIT "J."

STATE OF NORTH CAROLINA—In the Supreme Court.

Theophilus White
against
H. W. Ayer, Auditor, and W. H. Worth, Treasurer.

The State of North Carolina to Hal W. Ayer, State Auditor—GREETING:

This is an action of mandamus upon a money demand for salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to

issue. From which judgment the defendants appealed to this court, where the judgment of the court below was modified in amount of the recovery, and, as modified, the judgment of the court below was affirmed; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile travelled when engaged in the business of said Commission, and for other extra expenses, not to exceed fifty dollars per annum—whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the court that the defendant Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified by the Secretary of the Board of the Shell-Fish Commission, and countersigned by the chairman of the Shell-Fish Commission.

Now, therefore, you are hereby commanded, absolutely and peremptorily, without delay, to proceed to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasurer for such amounts as you may be found to be due the plaintiff thereon; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

Witness, Thomas S. Kenan, clerk of our said court, at office in Raleigh, this the seventeenth day of October, 1900.

[Seal.] THOS. S. KENAN,
Clerk of the Supreme Court.

Fee paid.

STATE OF NORTH CAROLINA,
OFFICE OF ADJUTANT-GENERAL,
RALEIGH, *July 5, 1900.*

Hon. H. W. AYER, *Auditor of State, Raleigh, N. C.*

SIR: You are authorized to give Mr. J. C. L. Harris warrant in my favor for my salary as Chief Inspector, as he is my attorney in fact and of record. THEOPHILUS WHITE.
Chief Inspector.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA,
To Theophilus White, Chief Inspector. Dr.

Salary as Chief Inspector from March 20, 1899, to September 1, 1900, being seventeen months and ten days (1) $577.78

To compensation for extra services as Chief Inspector under Act of 1899, chapter 19, from March 20, 1899, to September 1, 1900 (2)	$70.87
To compensation for mileage—voucher No. 3	6.00
voucher No. 4	15.50
voucher No. 5	20.00
voucher No. 6	9.00
voucher No. 7	10.00
voucher No. 8	14.50
voucher No. 9	10.00
voucher No. 10	26.00
voucher No. 11	8.00
voucher No. 12	12.50
voucher No. 13	6.00
voucher No. 14	13.00
voucher No. 15	20.00
voucher No. 16	9.00
voucher No. 17	3.00
Total	831.15

Received payment.

THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr

For salary as Chief Inspector from March 20, 1899, to September 1, 1900, 17 months and 10 days	$577.78

Approved:

.....
Secretary Board Shell-Fish Industry.

Countersigned by

T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman,
Chief Inspector.

Received payment.

THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for extra services as Chief Inspector under Act of 1899, chapter 19, from March 20, 1899, to September 1, 1900 ..... $70.87

Approved: .....
Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE,
Chief Inspector.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH. N. C,, *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from March 20, 1900, to April 20, 1900, two trips, from Hertford to Belhaven, one hundred and twenty miles $6.00

Approved: .....
Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney,

RALEIGH, N. C., *Septembr 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from April 20, 1899, to May 20, 1899, from Hertford to New Bern, thence to Washington, thence to Hertford, three hundred and ten miles $15.50

Approved: .....
Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from May 20, 1899, to June 20, 1899, from Hertford to New Bern, thence to Raleigh, four hundred miles $20.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS.

Approved: THEOPHILUS WHITE, C. I. S. F.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from June 20, 1899, to July 20, 1899, from Hertford to Belhaven three times, one hundred and eighty miles $9.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from July 20, 1899, to August 20, 1899, one trip to New Bern, two hundred miles $10,00

Approved: .....

Secretary Board Shell-Fish Industry.

Courtersigned by T. W. HARRIS. JR.
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from August 20, 1899, to September 20, 1899, twice to Belhaven and once to Swan Quarter, Hyde County, two hundred and ninety miles $14.50

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from September 20, 1899, to October 20, 1899, from Hertford to New Bern, two hundred miles $10.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from November 20, 1899, to December 20, 1899, from Hertford to Raleigh, four hundred miles $20.00

Two trips to Belhaven, one hundred and twenty miles 6.00

26.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C , *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from December 20, 1899, to January 20, 1900, from Hertford to Elizabeth City four times; to Belhaven once, one hundred and sixty miles $8.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from October 20, 1899, to November 20, 1899, one trip from Hertford to New Bern, thence to Beaufort, two hundred and fifty miles $12.50

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR ,
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE,
By J. C. L. HARRIS
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from January 20, 1900, to February 20, 1900, from Hertford to Belhaven twice, one hundred and twenty miles $6.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from February 20, 1900, to March 20, 1900, from Hertford to Belhaven, thence to Beaufort, two hundred and sixty miles $13.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from Hertford to New Bern and back twice, from March 20, 1899, to April 20, 1899, four hundred miles $20.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.

Approved: THEOPHILUS WHITE, C. I. S. F.

Received payment. THEOPHILUS WHITE
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N.C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from April 20, 1900, to May 20, 1900, one trip from Hertford to Washington, one trip from Hertford to Belhaven, one hundred and eighty miles $9.00

Approved: .....

Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

RALEIGH, N. C., *September 1, 1900.*

STATE OF NORTH CAROLINA

To Theophilus White, Chief Inspector. Dr.

For compensation for mileage from May 20, 1900, to June 20, 1900, one trip to Belhaven, sixty miles $3.00

Approved:

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Secretary Board Shell-Fish Industry.

Countersigned by T. W. HARRIS, JR.
THEOPHILUS WHITE, Chairman.

Received payment. THEOPHILUS WHITE.
By J. C. L. HARRIS,
His Attorney.

NORTH CAROLINA—Perquimans County.
SUPREME COURT, February Term, 1900.

Theophilus White
against
W. H. Worth, Treasurer, and H. W. Ayer, Auditor, Appellants.

F. H. Fusbee and *Cook & Green*, for appellants.
J. C. L. Harris, for appellee.

FURCHES, J. This is a controversy without action under sections 567 and 568 of The Code. The facts agreed, upon which the judgment of the Court is asked, are as follows:

The General Assembly of North Carolina in 1897 passed an act to provide for and promote the oyster industry of North Carolina, ratified February 23, 1897, being chapter 13 of the Laws of 1897. This act is made a part of the case.

That on the 23d day of February, 1897, the plaintiff was duly appointed by the Governor of North Carolina, under the provisions of said act, Chief Inspector for the constitutional term of four years, and was duly commissioned as such, and was inducted into said office and proceeded to discharge the duties thereof. The compensation to be received by him was as provided in section 13 of the act.

The General Assembly of North Carolina, in 1899, passed an act to provide for the general supervision of the shell-fish industry of the State, ratified March 2, 1899, being chapter 19 of the Laws of 1899. Under this act, the persons named in section two (2), namely: George H. Hill, of Washington, Beaufort County; B. D. Scarboro, of Avon, Dare County; Daniel L. Roberts, of New Bern, Craven County; Robert W. Wallace, of Beaufort, Carteret County; C. C. Allen, of Eliza-

beth City, Pasquotank County; J. M. Clayton, of Englehard, Hyde County; and Daniel B. Hooker, of Bayboro, Pamlico County, undertook to discharge the duties of Shell-Fish Commissioners, under the claim that the Act of 1897 was repealed by the Act of 1899.

That the persons named in the preceding paragraph, having undertaken, under the title of Shell-Fish Commissioners, to discharge the duties devolving upon the plaintiff as Chief Inspector, and having taken possession of the Steamer Lilly, the plaintiff brought suit in the county of Pamlico against said persons to try the title to the office. The record in said case, together with the opinion of the Supreme Court of North Carolina, adjudging that the title of the plaintiff was a valid one, is made a part of this case.

That since the 15th day of March, 1899, up to November 20, 1899, the defendant H. W. Ayer, Auditor of the State, has refused to issue to the plaintiff a warrant for the sum of seventy-five dollars per month and his actual travelling expenses, and has also refused to issue warrants to the deputy inspectors appointed by the plaintiff in accordance with the Act of 1897; and the defendant W. H. Worth, State Treasurer, for the same period of time, has refused to pay the salary and travelling expenses of the plaintiff as Chief Inspector, and also the fifty dollars per month claimed by the deputy inspectors.

That since the opinion of the Supreme Court has been filed the plaintiff has again demanded of the Auditor the issuance of a warrant in his favor for the amount of his salary and expenses, and the same has been refused by the defendants. The defendants base their refusal upon the Acts of 1899, chapter 21, which is made a part of this controversy.

The plaintiff insists that the decision of the Supreme Court, hereinbefore mentioned in the facts agreed, that he is entitled to a salary of seventy-five dollars a month and actual travelling expenses from the time of the last payment made to him up to the present time, and that this is not prohibited by chapter 21, Acts of 1899, above mentioned. He asks that a mandamus issue to the defendant, the State Auditor, requiring him to issue a warrant for the amount due him under the law, and also that a mandamus issue, directed to the State Treasurer, requiring and compelling him to pay the same, and for all further relief which, under the facts above mentioned and the law of North Carolina, he is entitled to.

It is further agreed that no part of the compensation as provided in chapter 19, Public Laws 1899, has been paid to the persons therein named as Shell-Fish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and travelling expenses as the plaintiff may be entitled to."

Upon these facts the plaintiff contends that he is entitled to a writ of

mandamus against the defendants. This contention is disputed by the defendants, and the plaintiff's right to a mandamus is denied.

It has been decided by this court that the plaintiff is entitled to hold his office of Chief Inspector, to which he was appointed in 1897, for the remainder of his term of four years. *White* v. *Hill*, 125 N. C., 194. This is settled, and the question is now presented as to whether or not he shall have pay for his services.

The plaintiff was duly appointed and inducted into his said office in March, 1897, for a term of four years, under an Act of the Legislature ratified on the 23d day of February, 1897—being chapter 13 of the Public Laws of that year. Under this Act he was entitled to a salary of $75 per month, or $900 per annum, payable monthly. This is not denied by the defendants, but they say that chapters 18, 19 and 21 of the Public Laws of 1899 had the effect to destroy the plaintiff's right to pay. They say that chapter 18 repeals section 13 of the Act of 1897, and this is true; and they say that chapter 21 prohibits them from paying a salary to any one not acting under chapter 19 of said Act; and it is true that this Act so provides. And the defendants say that the plaintiff is not acting under the Act, chapter 19, and is not entitled to any pay for his services. But, as it is seen that the plaintiff's office to which he was appointed in 1897, still exists, and that he is entitled to hold the same and perform its duties, it would seem that he is entitled to receive the salary attached thereto.

The Legislature may abolish a legislative office, and this is the end of it. *White* v. *Hill*, *supra*; *Hoke* v. *Henderson*, 15 N. C., 1. When the office is abolished, this ends the term of the officer holding it, as there can be no officer without an office, and of course no salary without an officer.

The Legislature may reduce the salary of an existing legislative office, if this is done for the benefit of the public, and not for the purpose of injuring the incumbent and to starve him out. But if it clearly appears that it was done for that purpose, it would be void. *Bunting* v. *Gales*, 77 N. C., 283; *Hoke* v. *Henderson*, *supra*. In cases where only a part of the salary is taken from the officer, it would have to appear from the legislation itself that the object was unlawful, or the courts would not interfere. *Hoke* v. *Henderson*, *supra*.

But if the Legislatnre should undertake to deprive the officer of the whole of his salary, while his office still continued, the intent would so plainly appear that the Act would be declared void. *Hoke* v. *Henderson*, *supra*; *Cotten* v. *Ellis*, 52 N. C., 545.

The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may be passed and in force, during his term of office.

The Legislature, on the 28th day of February, 1899, passed an Act expressly amendatory of chapter 13, Laws 1897—this being the Act under

which the plaintiff was appointed. And on the 2d day of March, two days thereafter, it passed another Act upon the subject of oysters and shell-fish. This Act does not state that it is an amendment of the former Acts, nor does it purport to repeal the previous legislation on the subject of oysters and shell-fish, except so far as they are in conflict with the Act of the 2d of March, 1899, and on the 8th of March, 1899, it passed chapter 21, which is stated to be "supplemental to chapter 19 passed on the 2d of March." This last Act prohibits the Treasurer from paying any compensation claimed for services, unless the person so claiming them shall be authorized to render such services under chapter 19, of which Act this Act is a supplement.

The Legislature having general powers of legislation, all these Acts must be observed and enforced, unless they conflict with the vested constitutional rights of the plaintiff. (We say the constitutional rights of the plaintiff for the reason that his rights alone are before us for our consideration.)

It is, then, the duty of the plaintiff to administer his office under the law as it now exists; that is, under the Act of 1897, as modified and changed by the Legislature of 1899, chapter 18, and chapter 19 of the Public Laws of 1899.

For the purposes of this action it is not necessary for us to decide whether chapters 18 and 19, Laws of 1899, were intended as amendments of the Act of 1897 or not. They are both a part of the Public Laws of the State, and must be observed when not in conflict with the plaintiff's vested rights. Chapter 18 is expressly stated to be an amendment to the Act of 1897; and chapter 19 does not state whether it is an amendment or not. But both Acts are on the same subject and must be considered together and treated as amendments. And where they expressly repeal the former Act, or are in conflict with its provisions, the provisions of the latter Act must prevail, unless they are in conflict with vested rights. It is so held in *White* v. *Hill*, *supra*, which is expressly put on *Abbott* v. *Beddingfield*, 125 N. C., 256, and *McNeill* v. *Webb*, *Ibid*, 243. And as the plaintiff is not only authorized to perform the duties required by chapter 19, but it is in fact his duty to do so, there can be no reason for applying the provisions of chapter 21; and it is not necessary for us to decide whether it would be valid or not, if it were necessary for us to decide that question.

The fact that the Legislature of 1899 changed the name of "An Act to promote the oyster industry of North Carolina" to that of "Shell-Fish Commissioners" did not abolish the plaintiff's office. *White* v. *Hill* and *Abbott* v. *Beddingfield*, *supra*; *Wood* v. *Bellamy*, 120 N. C., 212. Nor does the fact that the Act of 1889 changed the name of the plaintiff's office from that of "Chief Inspector" to that of "Chairman of the Shell-Fish Commission" oust the plaintiff from his office or deprive him of his salary. *Wood* v. *Bellamy* and *Abbott* v. *Beddingfield*, *supra*.

The plaintiff being entitled to his office and to the salary attached thereto, what is his salary under the legislation as it now exists, and how is he to get it?

Under chapter 19 of the Act of 1899 it seems to us that it has been reduced to $400 per annum and five cents per mile travel, when engaged in his work, and extra expenses not to exceed $50 per annum. We can not say that this reduction was not made for the public benefit, and we have no power to change it and no disposition to do so if we had. The reduction may be made. *Gales* v. *Bunting* and *Hoke* v. *Henderson*, *supra; White* v. *Murray*, at this term.

Then what is necessary to be done to enable the plaintiff to draw his salary? The Act of 1897 did not give specific directions as to this. The Act of 1899, chapter 19, section 9, provides that this shall be done upon the warrant of the Auditor, "which warrant shall be issued by the Auditor upon the certificate of the secretary of the said board, and countersigned by the chairman of the Shell-Fish Commission." This was only a matter of detail, which seems to have been proper to supply a defect in the Act of 1897, and was passed when it was thought that Hill and his force would be in office. And we can not, and do not, construe this paragraph to mean that the incumbent should not receive any salary for his services. This, in our opinion, would be to construe the Act to mean what we think the Legislature could not do; *Cotten* v. *Ellis*, *supra;* and it would also be to construe it to mean what it does not say, and what we do not think the Legislature intended it to mean.

So, if this direction as to the manner of issuing the warrant can not be literally complied with—*in hic verbis*—it should be complied with "as near as may be." That is, the certificate should be issued by the clerk of the present board and countersigned by the plaintiff, who is acting as chairman in place of Hill, and the Auditor's warrant should issue upon this certificate.

This opinion might close here, and would do so, but for the arguments urged in opposition to the views we have expressed, some of which it seems to us should be noticed.

It is said that chapter 19 names certain persons as commissioners, and that the plaintiff is not one of those named in the Act. This is true. But the act does not provide that the salary shall be paid to these parties, *eo nomine*, but to the commissioners performing the duties prescribed by the Act. Suppose any or all of the commissioners named in chapter 19 had died or resigned, is it contended that still they should receive the salary, or that the work should stop and the commission fall through and fail on that account? They are out, and, so far as we know, are not claiming any pay.

It was said this court had no jurisdiction of this matter; that it only has appellate jurisdiction; that the assumption of such jurisdiction is unheard of; that the judgment of the court will be *ultra vires*—unlaw-

ful, unconstitutional and void—and that the *Legislature* may declare it unconstitutional; and if it should do so, and the Treasurer should obey the judgment of this court, he might be in danger. This argument seems to proceed upon the idea that this proceeding was commenced in this court, whereas the record shows that it is here on appeal from the Superior Court of Pasquotank County. And it would seem that the slightest examination would have shown that it is not a proceeding unheard of before.

In *Marbury* v. *Madison*, 1 Cranch, 49, which was mandamus against James Madison, Secretary of the United States, it was held that the action would lie.

In *Cotten* v. *Ellis*, 52 N. C. 545, which was a proceeding in mandamus by Cotten, claiming a *salary* as Adjutant-General of North Carolina, against John W. Ellis, Governor of North Carolina, it was held that the action would lie, and the writ was issued.

But a more recent case is that of *Granville County Board of Education* v. *State Board of Education*, 106 N. C., 81, in which it was held that the action would lie, and the writ was granted. The opinion of the court in that case was written by Justice Clark, and seems to be a direct authority for issuing the writ in this case.

The opinion in *Cotten* v. *Ellis*, *supra*, is not only authority for granting the writ, but it would be well to note what the court says, near the close of the opinion, with regard to the execution of the writ, which is in these words: "We do not enter upon the inquiry as to how the writ will be enforced, because we are not allowed to suppose that the question will arise, feeling assured that the sole purpose of the Governor is to obtain a judicial construction of the statute in question." The opinion (*Cotten* v. *Ellis*) also contains this language: "A statute which *reduces* a salary during the term of office, and one which *takes away the salary altogether*, stand on different footings, for in the latter case, the object would evidently be to starve the incumbent out of his office, and thereby do indirectly what could not be done directly, so as to make applicable the remarks made in the case of *Hoke* v. *Henderson*, in which there seems to be much force, that such indirect legislation is as obnoxious to the charge of being unconstitutional as an Act directly depriving one of his office. A proper construction of the statute does not lead to the inference that it was the intention to abolish the salary in the event that the applicant still continued entitled to the office and liable for the discharge of its duties. On the contrary, the clause which repeals so much of the 9th Section, as relates to the salary, is a mere corrollary or incident to the clause which repeals so much of that section as relates to the appointment of the Adjutant General, and consequently the one cannot, by any rule of construction, be made to extend in its operation further than the other." To hold otherwise, the court says, 'would be to place the legislature in this attitude—We

mean to abolish the office: if we have not the power to do so, then we mean to deprive the present incumbent of his office; if we have not the power to do that, then we mean to take away his salary."

The facts in *Cotten* v. *Ellis* are so nearly the same as the facts in this case, is our excuse for quoting so much of the opinion.

Before the suggestion that the *Legislature may declare the opinion of this court unconstitutional*, may be adopted by anyone, we ask them to read the opinion of Chief Justice Marshall in the case of *Marbury* v. *Madison*, *supra*. It is a full and complete answer to this suggestion. We would like to incorporate the whole of that opinion in the opinion of the court in this case; but as this is impossible, we will again have to ask to be pardoned for making some quotations from this very able opinion, emanating from the mind of probably the greatest jurist this country has produced. It fully sustains the doctrine of *Hoke* v. *Henderson*, 15 N. C., 1, that an office is property—a vested right—of which he cannot be deprived. It discusses the relation of the government to the citizen, the supremacy of the Constitution over ordinary legislative acts, the relation of the Executive, Legislative and Judicial Departments of the Government, and shows that all three of these departments are equally bound by the Constitution, but within their own departments; that, while it is the exclusive right of the Legislative Department to enact laws and the duty of the Executive to enforce them, it is the exclusive right of the judiciary to construe them and to say whether they are repugnant to the Constitution or not. The idea that the Executive or the Legislative Department has any right to put a different construction on a statute or a different construction on the Constitution than the court has, is utterly repudiated. On page 59 (1 Cranch) it is said: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of vested legal rights." And on page 61 it is said: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the law of his country for a remedy."

On page 62. "The question whether a right has vested or not is in its nature judicial and must be tried by the judicial authority."

On page 64: "What is there in the exalted station of the officer, which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but upon particular acts of Congress and the general principles of law?"

On page 66: "The doctrine therefore now advanced *is by no means a novel one.*"

On page 67: "If Congress remains at liberty to give this court appellate jurisdiction, when the Constitution has declared their jurisdiction shall be original, and original jurisdiction when the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance."

On page 69: "The Constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is no law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people to limit a power in its own nature illimitable . . . . If an act of the Legislature, repugnant to the Constitution, is void, does it not withstanding its invalidity, bind the court and oblige them to give it effect? Or in other words, though it be no law, does it constitute a rule as operative as if it was a law?"

On page 70: "It is *emphatically the province and duty of the Judiciary to say what the law is*, (the italics are ours) . . . . So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the court must either decide the case conformably to the law disregarding the Constitution, or conformably to the Constitution disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

We cannot quote all of this very able and exhaustive opinion, but we trust that we have quoted sufficiently from it to establish the separate independent jurisdiction and power of courts to decide the law, and to show that neither the executive nor the legislative department has any such power.

Our opinion then is that the plaintiff is entitled to the salary and compensation provided for in the Act of 1899 chapter 19 (and the same that Hill would have been entitled to if he had remained in office), to be paid by the Treasurer of the State out of the oyster fund appropriated by the Act of 1897 and the Act of 1899 admitted to be now in his hands; provided that the expenses of this commission do not exceed the sum of six thousand dollars. per annum, and that the certificate and warrant shall be issued in the manner we have indicated.

The judgment of the court below will be modified in conformity with this opinion, and being so reformed, judgment will be entered in this court. Modified and affirmed.

Mr. OSBORNE: "I believe you stated you found these in your safe, didn't you?"

Dr. B. F. DIXON: "Yes; in the Auditor's office."

Q. So far as you know, no Judge on the Supreme Court bench ever saw them. You know nothing about that? A. No, sir; not a thing.

Mr. OSBORNE: "Mr. Watson, you omitted something. I call the attention of the Senate to it. According to the opinion in *White v. Ayer,* it required that the account should be countersigned by the Secretary of the Board of Shell-Fish Industry and then approved by Theophilus White. On every one of these accounts I find 'Secretary of Board of Shell-Fish Commission, countersigned T. W. Harris.' I just wanted to call to the attention of the Senate that no matter who he is, he was called Secretary of the Board."

Q. Dr. Dixon, have you paid White anything since you have been in that office? A. No, sir.

Q. You know nothing about this except what you hear. A. That is all that I know about it.

Mr. GUTHRIE: Q. Those are very recent claims, are they not? A. I have some claims, sir.

Q. Have some been presented to you? A. Yes; I got one to-day. I have quite a number besides this one.

Q. How much do they aggregate? A. I don't know, sir.

Mr. GUTHRIE: "Colonel Kenan, will you please take the stand again?"

Q. Among these papers, I see a mandamus writ with that endorsement on it. Whose handwriting is it? A. It is the handwriting of the clerk in my office.

Q. That is the handwriting of Mr. Seawell? A. Yes.

Mr. GUTHRIE: "May it please the Court, these papers belong to the Auditor's office, and I would ask leave of the Court that the Auditor furnish copies for the use of this Court."

The PRESIDENT: "I have no power over that matter. If there are no objections to it, you can do so."

Mr. Manager ROUNTREE: "Mr. President, ask the

Clerk of your Court to give Doctor Dixon a receipt for those papers."

Captain COOK: "I find that Doctor Dixon while delivering his testimony, says he has paid no claims to Mr. White."

Dr. DIXON: "I thought you had reference to the beginning of this impeachment case. There were a few small claims paid to Mr. White since I have been in the office."

Mr. GUTHRIE: Q. Were they connected with this oyster business? A. Yes.

Q. Look at this paper and tell us what amount is still unpaid.

(Objection is raised and the paper is withdrawn.)

Mr. GUTHRIE: "Mr. President, in behalf of the Managers of the House of Representatives, we announce to this Court that the prosecution will here rest."

Mr. JARVIS: "Mr. President, I presume, so that we may not have any controversy hereafter, that they will only be allowed to put on more witnesses in the event that it is such as is rebuttal to ours. All their testimony they must put on now, because we are entitled to a reply."

Mr. WATSON: "We may want to put on more testimony to strengthen our case."

Mr. JARVIS: "Mr. President, on the part of the respondents, I will say that whatever might be our opinion as to the propriety of closing this case without putting on any testimony in their behalf, if we were trying an ordinary case before a court and jury, if we were in that forum, upon this testimony we would not hesitate for one moment to go to a jury, but we think we are trying this case not only here, but, as was announced by the Honorable Chairman of the Board of Managers, in the name of the people of North Carolina; they have charged two high officials with high crimes and misdemeanors in office. It is our purpose to put the Judges on the stand and let them tell this Court and the people of

North Carolina all they did and their reasons for doing it, from the first day they came into office until now. Then we propose they shall be subjected to the most rigid cross-examination that can be given them by the distinguished counsel on the other side. But, sir, the case will be opened by Mr. Bynum, and we ask the courtesy of the Court that he will not be required to commence his address until Monday morning; and I will ask the Court to let him put it off until Monday morning. It is now only one-half hour before the time for adjournment."

Senator ARRINGTON: "I move that we adjourn until 10 o'clock Monday morning."

A sufficient number seconded the motion and it is adopted.

The PRESIDENT: "The Sergeant-at-Arms will adjourn the Court until Monday morning, March 18th, at 10 o'clock."

The Sergeant-at-Arms makes due proclamation and the Court stands adjourned until 10 o'clock Monday morning.

EIGHTH DAY.

THE SENATE CHAMBER,

Monday, March 18, 1901.

The Court met, pursuant to recess taken on Saturday afternoon, at 10 a. m., the President presiding.

The Sergeant-at-Arms made due announcement of the assembly of the Court.

The roll was called and the following Senators answered to their names:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Wood, Warren, Webb, Woodard.

Mr. JARVIS: "We desire to recall the Auditor to ask him a question; but we will not delay the Court now, and with the understanding that we shall have an opportunity of doing so later, Mr. Bynum will proceed with his argument."

MR. PRESIDENT AND SENATORS:

The learned counsel with whom I am associated have directed me to speak the first word in the defense of these respondents. I am to speak to the Senate of North Carolina sitting as the ultimate tribunal of the State, presided over by the Lieutenant-Governor, in behalf of the Chief Justice and an Associate Justice of the Supreme Court, who have been arraigned before you charged by the House of Representatives with the commission of high crimes and misdemeanors in office. In a controversy of such vast im-

portance—to the accused, involving their reputation, their honor and their future usefulness, and to the State the freedom and independence of its judiciary—it is natural that I should feel some embarrassment in assuming this grave and responsible task. But the wish of the respondents and their counsel commands my utmost obedience, and I therefore hasten to the performance of the duty which has been assigned me.

I shall not enter into details of the evidence which we expect to lay before you. Suffice it to say that upon the law and the facts as they shall be developed, upon the judicial merits of their case, upon the duties incumbent on them by virtue of their office and their honest endeavor to discharge those duties, these Judges rest their defense. And I ask each one of you to listen to me with that patience and attention which I cannot hope to command by any efforts of my own, while I open to you as plainly as I can what that defense is.

The honorable Manager who opened for the prosecution declared in the beginning of his address that strong influences had been employed to divert the minds of Senators from the real issue involved in this trial and to create the belief that the people of the State do not approve of this proceeding; and that such influences and suggestions could in every instance be traced to those personally interested in the defense.

Mr. President, in view of the situation of the respondents and the complexion of that body in which this proceeding originated, as well as of this before which it is to be tried, the statement of the learned Manager is, to say the least, surprising. Charged with grave offenses, suspended by operation of law from their high positions, with only a handful of friends in either branch of the Assembly, while the friends of the Managers are dominant in both, it is difficult to discern how the strong influences to which the

honorable Manager refers could exert their power. No considerate man will say that these Judges have sought by word or deed to prevent a calm, fair, judicial consideration of this case. That the real question be unobscured, that party spirit, political schemes and foregone conclusions may be abandoned, that there may be held here a trial in which impartial justice, according to the Constitution and the laws, shall be administered, is their hope and their reliance. The testimony before the House Committee relating to their official conduct was published and eargerly read throughout the State. If upon reading it the fair and impartial people of this conservative Commonwealth have felt constrained to declare their firm belief in the integrity and innocence of these Judges, they should not be blamed nor should the Managers complain; for the conviction of the guilty is not always rejoicing, while the condemnation of the innocent is a lasting calamity.

Article IV, section 2, of the Constitution of this State provides that "the judicial power of the State shall be vested in a court for the trial of impeachments, the Supreme Court, Superior Courts, courts of justices of the peace and such other courts inferior to the Supreme Court as may be established by law."

Section 3 of the same article provides that "the court for the trial of impeachments shall be the Senate."

For the purposes of this trial, therefore, the Senate is a court, organized as such under the judicial power of the State, and so styled in the provisions of the Constitution which I have read. It is the highest court of the State. Its powers and jurisdiction are clearly prescribed and defined by statute. It has power "to compel the attendance of parties and witnesses, to enforce obedience to its orders, mandates, writs, precepts and judgments, to preserve order, punish in a summary way contempts of its authority, and to make all legal rules and regulations which it may deem

essential or conducive to the ends of justice." Before entering upon his duty as a member of this court, every Senator is required to take an oath or make affirmation that he will "truly and impartially try and determine the charge in question under the Constitution and laws according to the evidence, and no member of the court shall sit or give his vote upon the trial until he shall have taken such oath or affirmation."

After the articles have been exhibited by the House of Representatives they become the impeachment, just as after the finding of a bill in a criminal court it becomes an indictment.

Of this impeachment you are the triers just as a jury are the triers of an indictment, except that you are judges as well as jurors. You sit together, hear the law and the evidence and render your verdict of guilty or not guilty upon every article. If your verdict be guilty, there may follow a greater ignominy, a severer punishment than ever attends the commission of any crime or misdemeanor not a felony under the laws of this State.

Here, then, is a high criminal court brought into existence by the Constitution, with jurisdiction prescribed by statute. It is composed of the Senators of North Carolina, sworn to impartiality; and the question given them in charge is the impeachment of the respondents at the bar.

Of the six impeachable offenses denounced by the statute, the respondents are charged with the commission of only one—that is, "corruption or other misconduct in their official capacity." Indeed, they are not charged with all of that, for it is not contended that they have been guilty of corruption, but of "other misconduct in their official capacity." What is meant by these words? It is a familiar rule of statutory construction, and so declared in State *vs.* Vosburg, 111 N. C., 721, that when there are general words following particular and specific words, the former

must be confined in their meaning to things of the same kind. And that when particular words are followed by general words, as after the enumeration of classes of persons or things it is added, "and all others," the general words are restricted in meaning to objects of like kind with those specified. Another well-settled rule of construction is, that criminal statutes must be strictly construed. Applying these well-settled principles to our present inquiry, we are forced to conclude that the words "or other misconduct in their official capacity" mean misconduct of the same kind and character as corruption in office. This is too plain for argument. State *vs.* Burrows, 33 N. C., 477; Commonwealth *vs.* Dejardin, 126 Mass., 47; Anderson's Law Dictionary, page 713; Southerland on St. Con., sec. 268, etc., pages 351, etc.; State *vs.* Vosburg, 111 N. C., 721.

What, then, is intended by the word "corruption" as used in this statute? The word is variously defined by lexicographers and law writers. In Anderson's Dictionary of Law the word "corrupt" is defined to mean "to do an act for unlawful gain." And the same authority defines corruption to be "an act done with intent to gain advantage inconsistent with official duty and the rights of others, something forbidden by law, as a champertous contract, a contract of usury." In the Century Dictionary the word corrupt is defined to mean "dishonest, without integrity, guilty of dishonesty, involving bribery, or a disposition to bribe or be bribed, as corrupt practices, a corrupt judge."

It is plain, then, Mr. President, that the words "or other misconduct in his official capacity" following immediately the particular word "corruption" relates to and is intended to define an offense of a nature similar to that of corruption in office.

It is meant not only to define the offense of willful misconduct in office which may be punished by the laws of

this State, but such misconduct as necessarily involves the element of corruption. No mere omission or neglect of duty, no error of judgment alone is meant by these words. It must be an unlawful act proceeding from a corrupt or bad motive. They mean something more than a technical violation of the law; they imply that such an act must be the result of an evil, dishonest purpose deliberately formed and carried out.

But, passing by the question which confronts us at the very threshold of this argument as to whether or not the impeachment in this case charges in any of its articles such an offense as is contemplated and included in the statutes of this State defining impeachable offenses, let us see what the honorable Managers are required to prove before they can be warranted in asking a conviction upon the impeachment as it stands.

Without reciting at length the allegations in the several articles, they may be summed up in the general statement that the respondents are charged with having, in their official capacity as Associate Justices of the Supreme Court and contrary to the course and practice of the courts, willfully rendered erroneous decisions and caused to be issued certain writs with a deliberate intent to violate the Constitution and nullify and destroy the laws of the State. The charge involves an unlawful act coupled with a specific guilty intent.

Judge Story, in his commentaries on the Constitution, says that "it is the boast of English jurisprudence, and without it the power of impeachment would be an intolerable grievance, that in trials by impeachment the law differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crime and punishment prevail." Section 798, 1 Bish. Cr. Law, section 915; State *vs.* Robinson, 111 Ala., 482–484. This being true, whatever is done here must be

done in accordance with the rules of criminal law ordinarily applied in the courts of this State. Before the honorable Managers can consistently ask for a conviction they must satisfy the court beyond all reasonable question not only that the respondents committed the acts charged in the impeachment, but that they committed them with the specific purpose and intent therein alleged, namely, to violate the Constitution and laws of the State. It is as imperative to prove one as it is the other, and there can be no conviction unless both are established beyond reasonable doubt.

No presumption exists, or can exist, of the respondents' guilt. Nothing can be inferred against them. On the contrary, they are presumed to be innocent of all error and all wrong, and this presumption is made by the law evidence in their behalf to be considered by the Court. No principle of law is more fundamentally important than this. It is axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. So great is the weight given to it by our courts that in recent years the Supreme Court of the United States has granted to a defendant in a criminal action a new trial upon the sole ground that the judge presiding at the trial in the court below failed to explain this principle in his charge to the jury.

In delivering the opinion of the Court in that case Mr. Justice White refers to the fact that Mr. Greenleaf traces this presumption to the Mosaic law, and shows that it is substantially embodied in the laws of every civilized nation of the world. He quotes as follows from the Roman law:

"Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents or by circumstantial evidence, which amounts to undubitable proof and is clearer than day.

"In criminal cases the milder construction shall always be

preserved; and in case of doubt it is no less just than it is safe to adopt the milder construction."

The learned Justice incorporates in his opinion an anecdote of Emperor Julian which illustrates the enforcement of this principle in the Roman law. The Governor of one of the provinces was on trial before the Emperor, and, contrary to the usage in criminal cases, his trial was public. The accused contented himself with denying his guilt, and there was not sufficient proof against him. His adversary and accuser, a passionate man, seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed: "Oh! illustrious Cæsar, if it is sufficient to deny, what will hereafter become of the guilty?" To which the Emperor replied: "If it suffices to accuse, what will become of the innocent?"

He further quotes from Vol. XXXIII of the State Trials, 275, 506, where, in speaking of this principle, Lord Gillies says: "I conceive that this presumption is to be found in every code of law which has reason and religion and humanity for a foundation. It is a maxim which ought to be inscribed in indelible characters in the heart of every judge and juryman. To overturn it, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty." Coffin *vs.* United States, 156 U. S., 454.

There is another well-settled principle of criminal law which is particularly applicable in the trial of this case. It is, that to constitute crime, great or small, there must, with the unlawful act, co-exist a criminal intent. Indeed, the word "willful" as used in the impeachment implies not only the knowledge or consciousness of wrong, but also a purpose to do wrong, or a bad intent. Potter *vs.* United States, 155 U. S., 446.

In Rosen *vs.* United States, 161 U. S., page 33, it is said that in their ordinary acceptation the words "unlawfully,"

"willfully" and "knowingly," when applied to an act or thing done, import knowledge of the act or thing done as well as an evil intent or bad purpose in doing such thing. In addition to the evil intent and bad purpose implied in the word "willfully," the impeachment expressly charges that the acts attributed to the respondents were done with the intent to violate the Constitution and laws of the State. So that not only must there be established an unlawful act, but the honorable Managers are required to go further and establish beyond question the guilty intent. This is the very essence of the charges contained in the impeachment, for certainly the respondents are not impeachable for an error of judgment.

In thus stating our position on this point, I do not overlook the contention of the learned counsel who opened for the Managers, that the respondents would be guilty even if they did no more than make a mistake of judgment. But, surely, Mr. President, the honorable Manager did not intend that to be taken seriously. He is too good a lawyer and too just a man for that. He would not impute to an officer, high or low, guilt and shame for mistakes made in an honest endeavor to discharge his duty. Yet that is the whole drift of his argument. In the progress of this trial we shall attempt to show the fallacy of that argument as applied to this case.

In State *vs.* McNich, 90 N. C., 695, it is declared that even a policeman is exempt from the operation of so harsh a rule; and that on an indictment for using excessive force in making an arrest he is entitled to have the question of his good faith submitted to the jury. And in State *vs.* Massey, 86 N. C., 660, it is held that "when the act of a person may reasonably be attributed to two or more motives, the one criminal and the other not, the humanity of our law will ascribe it to that which is not criminal. It is neither charity nor common sense nor law to infer the worst intent

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And this we propose to establish not only from the books, but as bearing on this question of honest intent, we expect to prove it by lawyers eminent in the profession who have specially examined the question. We know that every court is presumed to know the law, but there are members here who do not profess to be lawyers and the President is not permitted to give instructions on the law as is done in courts. Believing, therefore, that they would like to hear learned counsellors declare under oath their opinion as to the correctness of these judges' decisions, we shall tender them to this Court and ask the privilege of their examination.

Before passing to the discussion of the propositions I have stated, I wish to advert to the charge contained in the fifth and last article as being of a broader scope and in a measure including some of the charges embraced in the others. The respondents are here charged with deciding the cases known as the office-holding cases willfully and knowingly wrong for the purpose of bringing the General Assembly into public scandal, contempt and disrepute; and that in those decisions, for that purpose, by a specious course of reasoning, wherein they declared the acts of the Legislature unconstitutional in whole or in part, as suited their purpose, they nullified, destroyed and repealed acts of the General Assembly passed within the scope of its constitutional authority, in derogation of the Constitution and laws of the State; and that in culmination and consummation of such willful and unlawful intent and in violation of their oaths of office, the respondents caused the writs of mandamus to be issued in the case of White *vs.* the Auditor, and thus caused to be unlawfully withdrawn from the treasury the sum of $831.15, the amount claimed by White as his salary.

I do not gather from the opening speech for the Managers that it will be seriously contended that the respondents

are impeachable for concurring in the decisions rendered in those cases.

The cases came before them in the regular way, without any solicitation or procurement of the Judges, and their decisions upon them were rendered in the discharge of their official duty and in accordance with the settled law of the State as they understood it to be. Yet the whole drift of the honorable Manager's speech is in effect, that if the respondents even unconsciously committed an error in any one of these decisions they are guilty of high crimes and misdemeanors and should be convicted upon the articles here exhibited and removed in ignominy and disgrace from their high position.

The honorable Manager announced to the Court his purpose to show a partisan spirit running through all of these decisions, and "an attempt to prevent the people from controlling the exercise of their public offices," to use his own language, and to "weaken the power of the General Assembly." We do not believe the honorable Managers can make good this assertion, for we contend that the reverse of it is the truth; that instead of a partisan spirit being manifested in these decisions, of all such cases coming before the Court more of them were decided in favor of the party to which the honorable Manager belongs than were decided in favor of the party to which the respondents belong; and that instead of an attempt to weaken the power of the General Assembly those decisions disclose a purpose and a desire to uphold and sustain every act of the Legislature involved in them except only in that particular in which they clearly conflicted with the vested rights of citizens; and even in that respect the operations of the statutes were merely postponed until such terms should expire.

The legislative scheme is left undisturbed; the statutes as a whole are not declared void; the effect of the decisions

is merely to postpone the operation of those parts of the statutes which undertake to deprive the incumbent of his office before the expiration of his term; and even those provisions are left to take effect at the expiration of the term if in the meantime they shall not be repealed by the General Assembly. Let us examine and see:

1. What part of those statutes do the decisions of the Court declare inoperative?

2. What reason and authority had the Court for holding those parts of these statutes inoperative for the time?

3. Had the court the power thus to decide?

1. What part of the statutes does the Court hold inoperative? (Mr. Bynum here read from the cases of State Prison *vs.* Day, 124 N. C., 369; Abbott *vs.* Beddingfield, 125 N. C., 259, 260; McCall *vs.* Webb, 125 N. C., 247, 248; Green *vs.* Owen, 125 N. C., 221, and argued that the Court declares in express words in those cases that only those parts of the statutes invalid are void which conflict with the vested right of the officer to his office).

2. What reason or authority had the Court for thus deciding?

Mr. President, when these respondents came upon the bench they found firmly settled in our law the doctrine that an office is property; that the incumbent has to it the same right that he has to any other property; that there exists between the officers and the State a contract in which the officer, on the one hand, by his bond and his oath, is bound to the discharge of the duties of his office, and the State, on the other, pledges *her honor* that he shall have its emoluments; that when such a contract is struck it is as complete and binding as a contract between individuals, and cannot be impaired except by the consent of both parties; that while the Legislature may abolish an office of its own creation or reduce the emoluments to suit the public convenience, it cannot abolish the office and continue its

duties by transferring them to another, nor can it continue the office and at the same time take from the officer his salary; that even in reducing the emoluments of the office everything must be done in good faith and fair dealing, with no view to evade or directly or indirectly impair the substance of the contract.

Such they found to have been the settled law of this State for more than sixty years. They found it thus stated by Chief Justice Ruffin and concurred in by Judges Gaston and Daniel in 1833, in Hoke *vs.* Henderson, 15 N. C., pages 18 and 19: "But with these limitations and the like, a public office is a subject of property, as every other thing corporeal and incorporeal, from which men can earn a livelihood and make gain. The office is created for public purposes but is conferred on a particular man and accepted by him as a source of individual emolument. To the extent of that emolument it is private property as much as the land which he tills or the horse which he rides or the debts owing to him."

Twenty-seven years later they found it again announced by Pearson, Chief Justice, and concurred in by Battle and Manly in Cotton *vs.* Ellis, 52, 545, decided in 1860: "The legal effect of the appointment was to give the office to the applicant, and he became entitled to it 'as a vested right' for the term of three years, from which he could only be removed in the manner prescribed by law, and of which the Legislature had no power to deprive him."

In 1871, eleven years later, they found it declared by Judge Reade and concurred in by Pearson, Rodman, Dick and Settle, in King *vs.* Hunter, 65 N. C., 603, that "Nothing is better settled than that an office is property. The incumbent has the same right to it that he has to any other property. There is a contract between him and the State that he will discharge the duties of the office—and he is pledged by his bond and his oath; and that he shall have

the emoluments—and the State is pledged by its honor. When the contract is struck, it is as complete and binding as a contract between individuals; and it cannot be abrogated or impaired except by the consent of both parties. We do not wish to be understood as holding that there is any iron rule of construction of the details of the contract; on the contrary, there must be some flexibility to suit the public convenience and the convenience of the officers, such as would be implied from the nature of the contract and such as circumstances make necessary; *ex. gr.*, that if it happened that the emoluments are so inadequate that for them the officer cannot afford to serve the public, they may be increased, or if they be so extravagant as to be burdensome to the public, they may be diminished. But this must be done in good faith and in fair dealing, and with no view to evade, or directly or indirectly to impair the substance of the contract. Nothing needs to be better guarded than contracts with public officers; for although it is not to be supposed that the Legislature will be influenced by any but pure motives, yet as officers, and officers are of necessity connected with political parties, and are, insensibly, the objects of favor or prejudice, it is wise to protect the public against the former and the officer against the latter."

In 1873, two years later, they found the same principle re-affirmed by the Court in Bailey *vs.* Caldwell, 68 N. C., 472. Again in 1877, four years later, the Court affirmed the same doctrine in Bunting *vs.* Gales, 77 N. C., page 283: "It is admitted that a lucrative public office is private property, of which no one can be divested except by the law of the land, and it may also be admitted, so far as this case is concerned, that after a law has once fixed the tenure of office, a subsequent act of the Legislature cannot alter the tenure to the detriment of persons then in office; *e. g.*, by converting it from an office during good behavior or for four years, into an office for two years. This was the

decision in Hoke *vs.* Henderson, and in Taylor *vs.* Stanly, 4 Dev. 1, 31.

"It may also be admitted that the Legislature cannot select a particular officer and by a special law applicable to him alone, deprive him of any material part of his duties and emoluments. *This partakes of the nature of a judicial forfeiture without a trial.* This was the case of King *vs.* Hunter, 65 N. C., 603. Neither can the Legislature take away the entire salary of an officer. Cotton *vs.* Ellis, 7 Jones, 545."

And in 1897, yet twenty years later, the law is again declared in clear and unmistakable terms by Justice Montgomery and concurred in by the whole Court, consisting of these respondents, Chief Justice Faircloth and Justice Clark, in Wood *vs.* Bellamy, 120 N. C., 212; a case in which the Legislature in section 5 of chapter 265 of the Laws of 1897, by express words had undertaken to abolish the offices of superintendent of the asylums of the State, sought to be recovered in that action: "Before proceeding to an examination of the statute it will be in order to announce that, after full and able argument and after a careful examination of authorities cited by counsel from the courts of this and other States, we adhere to the opinion that an office is property and is the subject of protection like any other property, under the provisions of section 17 of Article I of the Constitution." Hoke *vs.* Henderson, *supra;* King *vs.* Hunter, 65 N. C., 693; Cotton *vs.* Ellis, 52 N. C., 545; Bailey *vs.* Caldwell, 68 N. C., 472; Bunting *vs.* Gales, 77 N. C., 283. Yet it is true that public offices, being for the public good and convenience, are not so completely the subject of property as are many other species of possession. Property in an office is qualified to some extent by the duties which the holder owes to the public in their performance. As, for instance, a public office cannot be sold or assigned. The holder cannot, as a rule, depute to

another the performance of the duties of the office. As for misfeasance or malfeasance, the courts, or other competent authority under such laws as may be in force on the subject, may deprive the holder of the same, but if such limitations and restrictions be excepted, a public office is as much the subject of property as a man can have in anything. The emoluments of the office are private property, "as much," as was said in Hoke *vs.* Henderson, *supra*, "as the land which one tills, or the horse he rides, or the debt which is owing to him."

Such was the law of this State as these respondents found it when they came upon the bench; and adhering to the conservative principle of *stare decisis*, they refused to overrule these decisions to the impairment of the vested rights of citizens of this State.

Chancellor Kent, in the first volume of his Commentaries, page 528, says: "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision, so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded and implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them, and people in general can venture with confidence to buy and trust and to deal with each other. If judicial decisions were to be too lightly disregarded, we should disturb and unsettle the great landmarks of property.

When a rule has been once deliberately adopted and declared, it ought not to be disturbed unless by a court of appeal or review, and never by the same court except for very cogent reasons and upon a clear manifestation of error, and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law. The language of Sir William Jones is exceedingly forcible on this point: 'No man,' says he, 'who is not a lawyer would ever know how to act, and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the pagan dieties were supposed to be bound by the decrees of fate.' "

The same thing, Mr. President, can be said about the construction of the Constitution and the acts of the General Assembly.

Another reason why the respondents decided these office-holding cases as they did is to be found in the application of the rules of interpretation which are usually followed in the construction of statutes. The statutes which they had under consideration being upon the same subject and passed by the same Legislature at or near the same time, were construed by the Court together and held to be amendatory of the acts which they purported to repeal. In construing them the Court refused to ascribe to the Legislature a wanton purpose to deprive, without cause, or trial or explanation, an officer of his property in his office or its emoluments. It adopted the more just and reasonable view that the Legislature had at heart the public welfare, rather than the mere control of any particular office for any particular person, and while the Court gave full effect to the legislative plan or scheme, it temporarily postponed the operation of the acts so far as they conflicted with the vested rights of an incumbent officer.

We maintain, Mr. President, that this was a proper construction, and in no way disrespectful to the General Assem-

bly or contemptuous of its will. (Mr. Bynum here read from and commented upon the following authorities: Simonton *vs.* Lanier, 71 and 505; Troy *vs.* Wooten, 32 N. C., 381; Rex *vs.* Loxdale, 1 Burrows, 447; State *vs.* Bell, 25 N. C., 506; Rhodes *vs.* Lewis, 80 N. C., 136, 139; Smith *vs.* Peoples, 47 N. Y., 330; Endlich on Interpretation of Laws, section 45; Potter's Dwaris on Statutes, 190, 2–3).

These are the reasons why the Court of which these respondents were members sustained the acts of the General Assembly referred to, except as to those parts which conflicted with vested rights.

3. Had the Court the power to declare the statutes void in whole or in part?

This doctrine is too well settled to admit of serious discussion.

Thirty-three judges have sat on our Supreme Court and all except two have declared acts of the Legislature unconstitutional. (Mr. Bynum here read from and commented on the following cases: Bayard *vs.* Singleton, 1 N. C., 44, 45; Robinson *vs.* Barfield, 6 N. C., p. 420; Stanmire *vs.* Taylor, 48 N. C., 211; Marbury *vs.* Madison, 1 Cr., 176; McAuley *vs.* Brooks, 16 Cal., p. 39; Cohens *vs.* Virginia, 6 Wheaton, 404).

The kind of legislation, which the respondents had before them in office-holding cases, Mr. President, has a history in the State to be learned from the decisions of the Supreme Court in its reported cases. In 1871–'72 the legislative and executive power of the State was in the hands of different political parties. The Legislature undertook to secure control of the charitable and penal institutions of the State before the terms of office of those in charge had expired; but the effort failed. Battle *vs.* McIver, 68 N. C., 467; Badger *vs.* Johnson, 68, 471; Nichols *vs.* McKee, 68, 429; Welker *vs.* Bledsoe, 68, 457.

Again, in 1895, the legislative power was in possession

of one political party and the executive in another. The same effort was renewed and again baffled by the unanimous decision of the Court in Wood *vs.* Bellamy and similar cases, 120 N. C., 212.

In 1899 came another political change and the same attempt again was made and again proved unsuccessful. No impeachment of the Court was thought of in 1872, none in 1895 or 1896, and what greater reason can be said to exist for it now?

In every one of these office-holding cases the opinion of the Court was concurred in by four Justices and one is as much responsible for the decisions as the others. One of them, the venerable Chief Justice, suddenly stricken by the hand of death, has gone to a higher court, before a Greater Judge. Two of the others are here, passing without complaint through this, the greatest ordeal of their lives. The fourth sits upon yonder bench unscathed and uncriticised in the faithful and uninterrupted performance of his official duties.

Are we not forced to the conclusion from this, that the members of the House of Representatives, in exhibiting through their Managers the impeachment against these respondents alone, were satisfied that in those decisions there was committed no wrong, or, if any, at most but an error of judgment?

Were the writs issued in violation of any constitutional provisions of the State?

The articles which it is contended the respondents violated are:

Article I, section 8: "The legislative, executive and supreme judicial powers of the Government ought to be forever separate and distinct from each other."

Article IV, section 9: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory; no process in

the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

And Article XIV, section 3: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

Before the Court can find the respondents guilty even of a technical violation of the Constitution in causing the mandamus to be issued, it must be established beyond question that the salary due from the Treasurer to White for services and expenses was "a claim against the State," within the meaning of Article IV, section 9 of the Constitution. For if it was not a claim of such a character, and the case was one in which the writs were the proper remedy, the Supreme Court had the right to cause them to be issued, and no provision of the Constitution was violated by their action.

Let us examine the nature of the claim. The General Assembly of 1897 passed an act to provide for and promote the oyster industry of North Carolina, which was ratified on the 23d day of February, and is chapter 13 of the Public Laws of that year. By its provisions any resident of this State desiring to engage in the business of taking or catching oysters with tongs, rakes, scoops or dredges in any of the waters of this State was required to obtain a license from the Clerk of the Superior Court of Dare, Hyde, Carteret, Craven, Onslow or Pamlico county. The holders of such licenses was required to pay an annual tax of $5 on boats or vessels without decks and under custom-house tonnage and $10 on boats or vessels with decks and under custom-house tonnage. All boats or vessels subject to custom-house tonnage were taxed at the rate of $3 per ton. These taxes were required to be collected by the Clerks of the Superior Courts of the counties named and forwarded monthly to the Treasurer of the State. (Section 5).

All violations of this act were made punishable by fines and forfeitures, which were to be forwarded by the sheriffs of those counties to the Treasurer of the State, to be credited with the taxes to a separate account called the "oyster fund." To carry out the provisions of the act, the office of chief inspector was created, whose term of office was fixed at four years, and whose duty it was, among other things, to appoint deputy inspectors at Currituck, Hatteras and Ocracoke, and such other places as might be necessary for the inspection of oysters and the enforcement of the law. The salary of the chief inspector was fixed at $75 a month and actual traveling expenses, and that of each deputy inspector $50 a month, to be paid by the State Treasurer at the end of each month out of the oyster fund collected and remitted to him under the provisions of that act. On the 23d day of February, 1897, Theophilus White was appointed by the Governor chief inspector for the term of four years from that date, and was duly commissioned and entered upon the duties of his office. In 1899 the General Assembly, by chapter 18 of the Public Laws of that year, ratified on the 28th day of February, amended the act of 1897, repealing those sections which created the office of chief inspector, leaving those duties still existing with no officer to perform them. Two days later the same Legislature, by chapter 19, in an act relating to the same subject, created a board of shell-fish commissioners, composed of seven men, whose names are set forth in the act, one of whom was to be chosen chairman and one secretary of the board. The term of office of the commissioners was fixed at two years and their salary $400 each per annum and five cents per mile going and returning from their places of meeting. The duties required of them were substantially the same as those required of the chief inspector in the act of 1897. They were to supervise the shell-fish industry of the State, collect the taxes of those

engaged in the business of taking, catching and handling shell-fish within the waters of this State, and remit such taxes to the Treasurer of the State. (Section 3). The Treasurer was required to keep the funds accruing "under that or any other act relating to the oyster or other shell-fish industry of the State separate and apart from the other public funds in his hands," and to "pay the expense of carrying out that act, including the compensation allowed by the State board to its agents, servants or employees, from that fund upon the warrant of the Auditor," which was to be issued upon the certificate of the secretary of the board, countersigned by the chairman of the board of shell-fish commissioners. (Section 9).

The seven persons named in that act, having assumed under the name of the "shell-fish commissioners," to discharge the duties devolved upon White as chief inspector by the act of 1897, he instituted an action in the Superior Court of Pamlico county to try the title to the office, and upon appeal the Supreme Court, in White *vs.* Hill, 125 N. C., page 194, treating chapters 18 and 19 of the Laws of 1899 as amendatory to the Laws of 1897, following its previous decisions, adjudged the office of chairman of the board of shell-fish commissioners to belong to White.

He then demanded of the Auditor and Treasurer the salary and expenses due him for services rendered as an officer of the State, and payment by them was refused on the ground that chapter 21 of the Laws of 1899 operated as a prohibition of such payment.

In order to obtain the opinion of the courts on this point, the facts constituting the case were agreed upon and by consent of the parties submitted in a controversy, without action under The Code, to Judge Starbuck, then holding the courts of the First Judicial District. In that case submitted it was expressly *agreed as a fact* that no part of the compensation provided in chapter 19 of the Laws of 1899,

had been paid to the persons therein named as shell-fish commissioners, *and that the State Treasurer then had on hand of the oyster fund, collected under chapters 13 of the Laws of 1897 and 19 of the Laws of 1899, an amount sufficient and available to pay the salary and expenses claimed by White.* Upon these facts White contended that he was entitled to a peremptory writ of mandamus, commanding the Auditor to issue his warrant for the amount due him, and a similar writ directing the Treasurer to pay it. Judge Starbuck granted the writs, and on appeal to the Supreme Court his judgment was affirmed, and on May 22, 1900, judgment was entered in the Supreme Court in accordance with its opinion filed in the case.

Here then is a salary due to an officer of the State, the amount of which is ascertained, admitted and fixed by statute, and a specific appropriation made by the Legislature for its payment. Was White then entitled to the remedy for which he applied?

As said by Chief Justice Marshall in Marbury *vs.* Madison, that depends first on the nature of the writ applied for, and second the power of the court to which the application was made.

The purpose of the writ of mandamus is to require an inferior court or an officer, corporation or person to do some particular thing specified therein which appertains to their office or duty, and it will be issued when the act required to be done is merely ministerial and the person seeking it has a clear right and is without any other adequate legal remedy. Burton *vs.* Furman, 115 N. C., 168, 169; Marbury *vs.* Madison, 1 Cranch, 168.

Nor is it disputed that the State Treasurer and Auditor are officers to whom, on legal principles, such writs may in proper cases be issued. Had White then any other complete legal remedy?

There are only three ways of collecting money from the State Treasury:

1. By an application to the Auditor to examine and liquidate claims as provided by section 3350, subsection 7, of The Code.

2. By an action begun in the Supreme Court under Article IV, section 9 of the Constitution, and section 948 of The Code.

3. By an action instituted in the Superior Court, as was done in White against Auditor.

The first of these remedies White sought by applying to the Auditor to examine and liquidate his claim as provided by law. He contended that he was a State officer and that, as such, provision had been specifically made by the Legislature for the payment of his salary. The Auditor refused to issue his warrant on the ground that payment to White was prohibited by chapter 21 of the Laws of 1899. This raised a question which could be finally and authoritatively settled only by the judicial department of the State, and to that department the parties interested agreed to go.

They were both represented by counsel and no point was made as to the jurisdiction of the Court or as to the venue, or any question of practice. All that was waived. Nor was it at any stage of the proceedings contended or even suggested by counsel on either side that the claim was one "against the State" within the meaning of Article IV, section 9 of the Constitution. The object was simply to obtain the opinion of the Court as to rights and duties of the respective parties.

Judge Starbuck held that chapter 21 was dependent upon and fell with those parts of chapters 18 and 19 of the Laws of 1899, which had been held to be void, and adjudged that White was entitled to his salary of $75 per month, as provided in the act of 1897, and ordered the writs to be issued.

The Auditor and Treasurer appealed, and in this way the case came before the Supreme Court. The parties were still represented by learned counsel and no point was yet raised as to venue or jurisdiction or that the debt was a "claim against the State."

The case was argued and Judge Starbuck's judgment was modified in two particulars: First, the Court held that White was entitled to a salary of only $400 a year, as prescribed by chapter 19 of the Laws of 1899, instead of $900, as provided in the act of 1897. Second, it did not hold that chapter 21 was invalid, as Judge Starbuck had held, but that inasmuch as, upon a proper construction of the acts of 1897 and 1899 on the subject of the oyster and shell-fish industry, chapter 19 of the Laws of 1899 was merely amendatory of chapter 13 of the Laws of 1897. White was authorized in law to act under the provisions of chapter 19, and therefore there was no reason for applying the provisions of chapter 21 in the case before the Court. With these modifications, Judge Starbuck's judgment was affirmed, and judgment was entered in accordance with that opinion. Let us see whether or not Judge Starbuck and the Supreme Court were correct in their views of this matter.

What was the purpose of Article IV, section 9 of the Constitution, and what is "a claim against the State" within its meaning? (Mr. Bynum here read from and commented on the following cases: Bledsoe *vs.* State, 64 N. C., page 394; Blount *vs.* Simmons, 119 N. C., 51; Bain *vs.* State, 86, 49).

Article IV, section 9 was first placed in our Constitution in 1868. Among the first cases in which the Supreme Court had occasion to construe it was Bledsoe *vs.* State, 64 N. C., 392. The Court there says: "Probably this provision in the Constitution was induced by the consideration that many claims would be presented *growing out of the events of*

the late war, and it was desired that they should have the consideration of the Court in aid of legislative action."

A claim against the State does not include such a claim as the salary of an officer. Burton *vs.* Freeman, 115, 172; Garner *vs.* Worth, 122 N. C., pages 256–257. Such salaries are a part of the current expenses of the State government.

The Constitution by "claim against the State" means such a claim as involves an invasion of the rights of the State, or the assertion of a liability against the State, the existence of which is disputed. Salaries of State officials being a part of the necessary expenses of the State government, cannot by any construction be hostile to the State. The Constitution contemplates by the words "claim against" the hostile assertion of right or liability.

The payment of salaries by the State is an expenditure of money for its own existence—expenses necessary for the protection of society and the welfare of its citizens. Such expenditures are as necessary to the life of the State as the expenditures of an individual for his own personal needs. As the State can act only through its officers, the payment of the salaries of those officers, if they can be called claims at all, are claims rather in favor of than against the State. When the General Assembly creates a public office it must be considered a necessary office, and when it appears that one of two men is entitled to the office and the salary is determined and the means of payment provided, it is an immaterial matter to the State which of the two persons is declared by the court to be entitled to it; but it is necessary that some one perform the duties of the office, and as an incentive and inducement to such performance, that he receive a salary; and it is well settled that where an officer has performed duties pertaining to the welfare of the State the courts are favorable to any construction that will secure to him pay for such services.

Theophilus White was an officer of the State as much so

as the Governor. His title to his office had been passed upon and held to be valid. Suppose the Auditor and Treasurer were to refuse to audit and pay the accounts of the State officers upon the ground that they did not like those officials, or on any other ground. According to the logic of the Managers, the salaries of these officers are claims against the State, and the courts would have no right to enforce payment by mandamus, but would be limited to making a recommendation to the Legislature. A recommendation to do what? Not enforce payment—for the Legislature cannot issue an execution or a mandamus—only the courts can do that. By "recommending" the Constitution means suggesting or advising the Legislature to provide means of payment; but the Legislature has already provided the means of payment by its revenue acts providing for the payment of the expenses of the State government, and in White's case by the appropriation of a specific fund for the payment of the salaries and expenses of those engaged in the supervision or promotion of the oyster or shell-fish industry.

For what purpose, therefore, would you have had the Court recommend to the Legislature, and what recommendation should it have made? That the Legislature do again what it had already done? Clearly, therefore, the salaries of State officers cannot be "claims against the State" within the meaning of the Constitution.

When it appears that the Legislature has provided the means of payment, then the courts alone can enforce payment, and it becomes the duty of the courts to do this by mandamus. There is no other legal remedy. If this is not so, as the prosecution contends, then the only way is for the Governor to call the Legislature in special session to impeach the Auditor and Treasurer, in order that the Governor might appoint in their places officers who would

perform their duty by paying the expenses of the State government.

We take the position, Mr. President, that by their very nature the salaries of State officials are necessary to the life of the State, and can in no case be claims against the State, and it makes no difference whether there are funds on hand or not. If it does not appear that there are funds on hand available for their payment, then it would be the duty of the Court to issue an alternative mandamus. If on its return it appeared that there were no funds available, the Court should then refuse a peremptory mandamus. But if it appeared as an admitted fact that there were funds available, it would be utterly without purpose to issue an alternate mandamus, and in such cases the peremptory writ should be issued to compel the Auditor and Treasurer to perform the plain ministerial duty of paying the officer the salary to which the Court had declared him entitled.

If in any case the salary of a State officer can be considered a claim against the State, which we deny, it can only be in a case where no means have been provided for payment. The very use of the word "recommend" shows this is bound to be true. The use of that word shows that to be "a claim against the State" the claim must be one which if established makes it necessary for the Court to "recommend" to the Legislature. That recommendation, as I have shown, can be for only one purpose, namely, that the Legislature may provide a fund or means of payment. If this has already been done, it would be utterly useless for the Court to recommend. It must enforce; and therefore the matter cannot be a claim against the State.

If in White's case there had not been provided a specific fund, then he would have been entitled to be paid just as the Governor or any other State officer out of the general fund provided by the revenue act for the payment of the expenses of the State government, and the mandamus

would have issued any way. But it appeared, and is indisputable, that there was a fund specifically set aside for the purpose of paying the official in charge of the shell-fish industry, and which was on hand unused by the State Treasurer, so that question is not raised. When the Court declared White entitled to the office and determined his compensation under the legislative acts, and it was admitted that there was a fund on hand which under those acts it had been declared should be used in paying the shell-fish commissioners, then it became the mere ministerial duty of the Auditor to audit his account and of the Treasuer to pay it, and it became equally the duty of the Court to enforce the performance of these duties by writs appropriate to that purpose, and not to recommend to the Legislature to do what it had already done. Board of Education *vs.* State Board, 106 N. C., 83; Burton *vs.* Furman, 115 N. C., 172; Garner *vs.* Worth, 122 N. C., 156–'57; McAuley *vs.* Brooks, 16 Cal., pages 45 to 47, and 55, 58 and 59.

2. Were the writs issued in violation of chapters 19 and 21 of the Laws of 1899?

I have already discussed the construction placed by the Court on chapters 18 and 19, Laws of 1899—that, taken together, they continued substantially the duties of the office of chief inspector created by chapter 13 of the Laws of 1897, changing the name of the office and transferring its duties to seven men instead of one; that those chapters did not have the effect in law to abolish that office, but were intended as amendments to the act of 1897; that as such they were given full force and effect in all of their provisions, with the exception that, in view of the settled law of this State, they could not operate to divest White of his right of property in his office before the expiration of his term, but their legal effect was to continue him in office as chairman of the board of shell-fish commissioners, with the duty devolving upon him to enforce the provisions and per-

form the services prescribed in the original act as amended by the later one. Construing these chapters in that way, the Court held that chapter 21 did not forbid the Treasurer to pay White the salary fixed by chapter 19, but, on the contrary, being authorized, on a proper construction of those statutes, to perform the services required by chapter 19, it became the duty of the Treasurer to pay him for such services.

Let us examine the act and see whether or not the position of the Court is sustained by authority. Chapter 21, Laws of 1899, is as follows:

"SECTION 1. The Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shell-fish industry unless such person or persons are authorized to render such services under the provisions of the said act, entitled 'to provide for the general supervision of the shell-fish industry of the State of North Carolina,' and ratified March second, eighteen hundred and ninety-nine."

It will be noted that this act does not in terms repudiate White's claims or forbid the payment of any compensation to him. Its direction is that the Treasurer shall not pay any compensation to any person for services rendered concerning the shell-fish industry unless such person is authorized to render such services under the provisions of chapter 19. The court had already decided in White *vs.* Hill that chapter 19 was intended as an amendment to chapter 13 of the Laws of 1897, and that the office of chairman of the board of shell-fish commissioners, created by chapter 19, was but a continuation of the old office of chief inspector and belonged to White, and that he should perform the duties of that office in accordance with the provisions of that act. The question, therefore, as to whether chapter 21 had the effect to prohibit payment of his salary or whether he was in contemplation of law authorized to perform the

duties and render the services prescribed by chapter 19 was purely a judicial question, involving a construction of those acts. What department under our form of government had the power authoritatively and finally to decide that question? Had the Executive? Had the Senate? Or the Senate and House together? No, Mr. President. The courts of the State, and they alone, had that power and that right, and in the exercise of the power the Court did decide it and decide it correctly.

The Court held that White was authorized in law to render such services, and that there could be no reason therefore for applying the prohibitions of chapter 21 to him. In this we maintain that the Court was right.

It is a well established rule that where a public officer has rendered services pertaining to the welfare of the State the courts are favorable to any reasonable construction of the law that will secure his payment. Byrd *vs.* Conway, 5 Ark., page 436 and 444.

But suppose chapter 21 be treated as an express prohibition to the Treasurer to pay White his salary, would it as such be valid and would it prevent the Court from compelling its payment by mandamus? I would impress upon the Court that White is the person whose right to the office of chairman of the board of shell-fish commissioners had been adjudged to be valid by the final tribunal in this State having the right so to adjudge; that he was in law entitled to its emoluments and authorized to perform the duties and render the services prescribed by chapter 19 of the Laws of 1899; that this right was a vested right to property of which he could not be deprived by any legislation direct or indirect, evasive or otherwise, which left the office in existence and sought to starve him out by taking from him his salary. There is no doctrine more firmly settled in this State than this. Any act of the Legislature denying to him the salary to which he was, under his contract with the State, entitled,

and thus attempting to remove him, would be an exercise of judicial power which the Legislature does not possess, and which would therefore be void. It would be seeking to do indirectly that which cannot be done directly. In Hoke *vs.* Henderson, on page 27, Chief Justice Ruffin says: "To do indirectly, in the abused exercise of an acknowledged power, not given for, but perverted to, that purpose, that which is expressly forbidden to be done directly, is a gross and wicked infraction of the Constitution, and the more so because the means resorted to deprive the injured person, and are designed to deprive him, of all redress by preventing the question from becoming the subject of judicial cognizance."

(In support of his position on this point, Mr. Bynum here cited and commented on the following cases: Cotton *vs.* Ellis, 52 N. C., 545; Bailey *vs.* Caldwell, 68, 472; Bunting *vs.* Gales, 77, 283; McCauley *vs.* Brooks, 16 Cal., pages 35, 50, 51).

The Court having decided in White *vs.* Hill that White was legally in office, he was as much entitled to the salary annexed to the office as to the office itself, and could no more be deprived of the former than of the latter. The Court had, therefore, jurisdiction to make its judgment effective by adequate proceedings; otherwise the judgment of the Court would have been ineffectual and the officer would have been without remedy; for it is reasonably certain that if White had applied for relief under Article 4, section 9 of the Constitution, no "recommendation" by the Supreme Court for the payment of his salary would have been heeded by the Legislature which had attempted to deprive him of his office.

If the Legislature had the power to stop the pay of White, it has equally the power to stop the pay of any other salaried officer of the State, whether he is a legislative or constitutional officer, and thus by a process of starvation under-

mine and subvert a co-ordinate department regarded as the balance-wheel of our form of government. Article 4, section 9 of the Constitution was never intended to confer that power on the General Assembly. If White, therefore, had applied for relief under that section of the Constitution, it would have been the duty of the Supreme Court to dismiss the case for want of jurisdiction. Its decision under this section could not be enforced by any process of the Court; it would be merely advisory and bind nobody, being addressed simply to the discretion of the Legislature.

The original advisory jurisdiction of the Supreme Court conferred by Article 4, section 9 of the Constitution has no application to cases of this sort, but relate to a wholly different class of claims, to-wit, where the State, through her officers or agents, has committed trespasses, injuries or wrongs upon her citizens, and where they cannot sue the State, but in equity and good conscience might be entitled to compensation. Instances would be the impressment of private property and trespasses upon houses, lands or persons. In these and other injuries, where the damages are uncertain in amount and the liability of the State is disputed and the question involves principles of equity and justice more suitable for the investigation of a legal tribunal than a legislative body, the matter is referred by Article 4, section 9 to the Supreme Court for its advice and recommendation to the General Assembly. White, therefore, properly began his action in the Superior Court, and upon the final judgment on appeal to the Supreme Court he was entitled to the process of mandamus to recover his salary; and that writ was issued according to approved precedents and in conformity with law, even if it should be held that the statute was intended to deprive him of his salary.

The chief authority cited against our position on this point is Shaffer *vs.* Jenkins, 72, 275.

In this case the Legislature, by an act of March 11, 1869,

appropriated $5,000 for the construction of a turnpike road in Carteret and Craven counties. The Superintendent of Public Works was directed to appoint a surveyor and commissioners to locate the road, and, upon their report, to let out the construction of the road and appoint a superintendent of the work. The construction was to be paid for by the Treasurer on the warrant of the Governor, who was directed to issue his warrant for the payment of the contractors from time to time whenever the Superintendent of the Public Works and the agent for construction should certify to him that any one or more sections had been completed and received. It did not appear that any work whatever had been done upon the road or that the Superintendent of Public Works and the agent for construction had ever so certified to the Governor; yet warrants to the amount of $2,500 were issued to the contractors and by them assigned to Shaffer, the plaintiff.

On December 13, 1871, the Legislature, by resolution, directed the Treasurer not to pay these or any similar warrants to any person, and an action was afterwards brought by the assignee of the warrants to compel their payment. The State denied the debt itself and there was an express and positive prohibition to pay it to any person at any time. The power of the Treasurer over the fund appropriated was in express terms withdrawn. The debt was repudiated and its payment to any person was prohibited.

Chapter 13, Laws of 1897, set apart a distinct fund and gave the Treasurer power over it for the purpose of paying the salaries and expenses of those who should render services under its provisions. Chapter 19 of the Laws of 1899, held by the Court in White *vs.* Hill as an amendment to chapter 13 of 1897, likewise provided a specific fund to pay the salaries and expenses of those rendering services under its provisions. Chapter 21 in nowise withdrew the power of the Treasurer over this fund further than to

direct him to pay it only to those performing the services required by chapter 19, to which it is, by express words, supplemental. The obligation of the State to pay was never denied or repudiated. The question was, considering these several acts dealing with the same subject together, who was authorized to render services under chapter 19?

As to that, a difference of opinion arose as to the law, and the settlement of the question was left to the only power which under our form of government can finally determine such questions, namely, the Supreme Court of the State. That tribunal answered that the person authorized to render such services was plainly the person or persons rightfully performing the official duties prescribed by that act, and that as White was rightfully performing these duties he was one of the persons entitled to be paid. The debt, then, was fixed, the amount ascertained, the Treasurer had a separate fund from which it was to be paid, and he and the Auditor were informed by the judgment of the Court as to whom that part which White claimed was due.

Their duty, then, was the mere ministerial one of paying an officer his salary as directed by law—and this duty, by all the authorities, they can be compelled to perform by mandamus. In closing the opinion in Shaffer *vs.* Jenkins the Court uses the following language, which is directly applicable to our case: "*If the Legislature, by way of contract, has specifically appropriated a certain fund to a certain debt, or to a certain individual or class of individuals, and the State Treasurer, having that fund in his hands, refuses to apply it according to the law, he may be compelled to do so by judicial process.*"

It is not my purpose, Mr. President, to discuss at any length the questions involved in Articles III and IV of the impeachment. I do not attach to them very great importance. As to Article III, the resolution of the Legislature

was passed after the Court had ordered the writs to be issued and had adjourned and gone home. The respondents knew nothing of it, and even if they had actually known it, they had already disposed of the case of White *vs.* Auditor.

But if the General Assembly really intended that White should not be paid, why did it not then forbid the Treasurer to pay him? That would have been as easy as to pass the resolution of inquiry.

As to Article IV and the specifications thereto, I have already discussed the question as to whether White's salary was a "claim against the State."

1. The question of venue may always be waived, and was waived in White *vs.* Auditor, by consent. Clark's Code, 3d Ed., section 190, and cases cited.

2. A controversy without action can be submitted under The Code as in other questions of difference. The practice is the same in actions for mandamus as in other civil actions. Sections 623 and 567 Clark's Code.

3. See Rule 51 of the Supreme Court.

As to the objection made by the respondents to the publication in the official reports of the Court what Justice Clark called his "dissenting opinion," we maintain that such objection was entirely proper. When that very case of White *vs.* Auditor was determined on May 22, 1900, Justice Clark filed an exhaustive opinion dissenting from the judgment of the Court, which was published in Volume 126 of the Reports. In that dissenting opinion, on pages 602 and 606, he treats the writs of mandamus as having already been ordered to be issued. He certainly had no *right* to publish a *second* dissent, especially when it is considered that there was nothing, on this second occasion, before the Court upon which an opinion or dissenting opinion could be delivered.

III. Did the respondents cause the writs to be issued with the intent to violate the Constitution and laws of the State?

This is the real, the true question in the case, even supposing the respondents to have committed error in their construction of the law.

Here there is charged a specific intent, namely, to violate the Constitution and laws of the State. It is an essential element of offenses described in the impeachment, and must be proved beyond reasonable question or respondents must be acquitted.

(Mr. Bynum here stated and commented on the position assumed by the Managers that no specific intent or even knowledge was required to be shown, and distinguished the cases of State *vs.* Hatch and State *vs.* McLean, cited by Manager Allen, from the case at bar. He read from State *vs.* King, 86 N. C., page 606; Cunningham *vs.* Dillard, 20 N. C., 351; Governor *vs.* McAfee, 13 N. C., page 15; State *vs.* Pritchard, 107 N. C., pages 926–'7; State *vs.* Powers, 75 N. C., 281; Furr *vs.* Moss, 52 N. C., 525; McAuley *vs.* Brooks, 16 Cal., 56).

And so, Mr. President, without citing further authority on this ground, you see it is plain that a judge or other judicial officer is not liable civilly or criminally for an error of judgment. I should not discuss this point but for the learning and ability of the Manager who argued it in opening the case. He read to you from the proceedings of the trial of Andrew Johnson. I wish to read to you from the opinion of William Wirt, for eight years Attorney-General of the United States, in his argument upon the trial of Judge Peck. His views were adopted in that case by the Court and the Judge was acquitted. This trial was before the Senate of the United States, and Judge Peck was charged with intent to injure and oppress a certain lawyer by attaching him for contempt, putting him in jail and suspending him from practice for eighteen months because he wrote a respectful criticism of an opinion which Judge Peck had published in the newspapers. It was contended by the

Managers in that case, *first*, that the act of the attorney was not a contempt of Court; *second*, that even if it was punishable as such, the judge had exercised the power with an evil and unlawful intent. One of the counsel contended, as was done in this case, that Peck was liable whether it was done with good or bad intent; that the mere act implied the intent, and that it was immaterial to prove it. In answering that argument, Mr. Wirt uses the following language:

"Another of the learned Managers (Mr. Wickliffe) has advanced a proposition so novel and so directly confronted by all the authorities, that had it not been for some other things that I have heard in this case, I should have heard it with unmixed surprise. The honorable Manager tells us that 'he cares not for proof of intention; that he cares not whether the judges acted wrong from ignorance or intention; that ignorance of the law is no excuse in an unlearned layman, much less in a learned judge; that every man is presumed to know the law, and *a fortiori* a judge whose office it is to understand and administer the law. If, therefore, a judge, through ignorance of the law, has done that which he has no power to do, he is just as guilty in the eye of the law as if he had sinned intentionally against the light of knowledge."

Then, according to this process of reasoning, a mistake of the law by a judge is an impeachable offense! But is it possible that the honorable Manager can mean to contend that a judge is answerable, either civilly or criminally, for an error of judgment; that he can be either sued, indicted or impeached for such an error? If such be his meaning, he is in direct conflict with all the authorities on the subject. The quêstion is not a new one. It has been long since settled both in England and in the United States, and I am not aware that for many centuries any judge or advocate has, even by inadvertence, sanctioned or even

countenanced the position which has been thrown out by the gentleman. From the reign of Edward the III. to the present day the current of authorities is clear and uniform the other way, and establish beyond controversy the principle that a judge of a court of record is not answerable either civilly or criminally for a mistake of judgment in his judicial character. The English authorities are reviewed by Chief Justice Kent in the case of Yates and Lansing, 5 Johnson's Reports, 291. The case was that of a civil suit against Chancellor Lansing for having punished as a contempt an act which had been finally decided by the High Court of Errors and Impeachments not to be so punishable. In the page to which I have referred Chief Justice Kent announces in the following terms the proposition which he establishes by the English authorities:

"The doctrine which holds a judge exempt from a civil suit or indictment for an act done or omitted to be done by him, sitting as a judge, has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts, amidst every change of policy and through every revolution of their government. A short view of the cases will teach us to admire the wisdom of our forefathers, and to revere a principle upon which rests the independence of the administration of justice. *Juvat accedere fontes atque haurire.*"

Having gone through some of the authorities in the year-books, he proceeds thus on page 292: "These cases, and many other opinions of the like effect which could be gleaned from the year-books, conclusively show that judges of all courts of record, from the highest to the lowest, and even jurors who are judges of fact, were always exempted from prosecution, by action or indictment, for what they did in their judicial character. It did not escape the discernment

of the early sages of the law that the principal requisite to secure a free, vigorous and independent administration of justice applied to render jurors as well as judges inviolable, and I fully acquiesce in the opinion of Lord Chief Justice Wilmot that 'trials by jury will be buried in the same grave with the authority of the courts who are to preside over them." Chief Justice Kent then proceeds to examine the authorities subsequent to the year-books, and in the course of this review comes to the case of Hammond and Howell, to his remarks on which I beg leave to call the attention of the Court. In page 293: "But the case of Hammond and Howell (1 Mod., 184; 2 Mod., 218) deserves our particular notice, as being peculiarly weighty on the point before us. This is the case to which I have already alluded for another purpose. The defendant was Recorder of London, and, as one of the judges of Oyer and Terminer, had fined and imprisoned the plaintiff because he had brought in a verdict, as a petit juror, contrary to the direction of the Court and the evidence. If ever a case was calculated to awaken sensibility and to try the strength of the principle, this must have been one. It arose soon after the decision of Bushel's case, in which it was agreed by all the judges that a juror was not finable for his verdict. The act of the defendants was admitted to have been illegal, and no doubt it struck the whole Court as a high-handed and arbitrary measure. The counsel for the plaintiff admitted the weight of the objection that an action would not lie against a judge of record for what he did *quatinus* a judge; and he endeavored to except this case from the general principle by contending that what the defendant did was not warranted by his commission, and that, therefore, he did not act as judge. But the Court did not yield to such miserable sophistry, for they held that the bringing of the action was a far greater offense than the imprisonment of the plaintiff, for it was a bold attempt

both against the government and justice in general. They said that no authority or semblance of authority had been urged for an action against a judge of record for doing anything as a judge; that this was never before imagined; and no action would lie against a judge for a wrongful commitment, any more than for an erroneous judgment; that though the defendant acted erroneously he acted judicially, and if what he did was corrupt, complaint might be made to the King, and if erroneous it might be reversed. The complaint to the King here contemplated is with reference to an impeachment or removal. And the Court observe that the case put as rendering that course was proper if the judge had acted corruptly in doing what he had done; that is, with a wicked intention to oppress under color of law."

In the farther progress of the same opinion, Judge Kent cites the case of Grovenvelt *vs.* Burnwell (12 Mod., 336; 1 Salk., 396; 1 Lord Raym., 454), in which Sir John Holt, after stating this exemption of the judges from all liability for mere error of judgment, concludes "that it would expose the justice of the nation, and no man would execute the office of judge upon the peril of being arraigned by action or indictment for every judgment he pronounces."

"I shall close this review of the cases," says Judge Kent, "with noticing one arising in an American court. The case I allude to is that of Phelps and Sill, lately decided in the Supreme Court of Connecticut. (1 Day's Case in Error, 315). From the characters composing that court I think the decision entitled to great consideration. That was a suit against a judge of probate for omitting to take security from a guardian, and the Court held that the action would not lie. They said that 'it was a settled principle that a judge is not to be questioned in a civil suit for doing, or for neglecting to do, a particular official act in the exercise of judicial power; that a regard for this maxim was essential to the administration of justice.' If by any mis-

take in the exercise of his office a judge should injure an individual, hard would be his condition if he were to be responsible for damages. The rules and principles which govern the exercise of judicial power are not in all cases obvious: they are often complex, and appear under different aspects to different persons. No man would accept the office of judge if his estate were to answer for every error in judgment, or if his time and property were to be wasted in litigations with every man whom his decisions might offend."

"Judicial exercise of power," continues Judge Kent, "is imposed upon the courts. They must decide an act according to their judgment, and, therefore, the law will protect them. The Chancellor, in the case of the plaintiff, was bound in duty to imprison and re-imprison him if he considered his conduct as amounting to a contempt of court. The obligations of his office left him no volition. He was as much bound to punish a contempt committed in his court as he was bound in any other case to exercise his power. He may possibly have erred in judgment in calling an act a contempt which did not amount to one, and in regarding a discharge as null when it was binding. This Court may have erred in the same way; still it was upon an error of judgment, for which neither the Chancellor nor the Judges of this Court are, or can be, responsible in a civil suit. Such responsibility would be an anomaly in jurisprudence. No statute could have intended such atrocious oppression and injustice. The penalty is given only for the voluntary and willful acts of individuals acting in a private or ministerial capacity. It is a mulct and given by way of punishment. The person who forfeits it must knowingly, contrary to the act, re-imprison or cause the party to be re-imprisoned. There must be the *scienter* or intentional violation of the statute; and this can never be imputed to the judicial decisions of a court. It would

be an impeachable offense which can never be averred or shown but under the process of impeachment."

What does the Judge declare would be an impeachable offense? The acting with knowledge (*scienter*) that the Judge was violating the law—"the intentional violation of the law." The Chancellor, he says, was bound to imprison the party if he considered his conduct as a contempt of the Court. He might have been mistaken in considering that as a contempt, which, in truth, was not one. But this would have been a mere error of judgment for which he was not answerable even civilly, much less criminally. If he knew it was not a contempt and still punished it as one, it would have been an intentional violation of the law which would have been an impeachable offence. Here is the very doctrine for which we are contending, that it is the guilty intention which forms the gist of the charge in every impeachment, and that a mere mistake of judgment is not an impeachable offense.

Chief Justice Kent winds up the able opinion which we have been considering with these emphatic remarks:

"No man can foresee the disastrous consequences of a precedent in favor of such a suit. Whenever we subject the established courts of the land to the degradation of private prosecution, we subdue their independence and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society, and to overturn those institutions which have been hitherto deemed the best guardians of liberty."

Will it be said that Judge Kent is here speaking of only a private suit? And is a judge answerable criminally for an act for which he would not be answerable even civilly? Is it less calculated to subdue his independence to hold him answerable to an impeachment for a mere error of judg-

ment? What man would hold the office of a judge under such a responsibility? Sir, if it had been supposed possible to sustain an impeachment for an error of judgment, Chancellor Lansing would not have escaped the experiment. The case was one of extreme excitement. The Chancellor had committed Mr. Yates for a contempt. Judge Spencer, holding the commitment illegal, had discharged him on *habeas corpus.* The Chancellor holding the discharge to be illegal, again committed him. Judge Spencer again discharged him on *habeas corpus.* The Chancellor the third time ordered him to be imprisoned. From this last order Mr. Emmet, as counsel for Yates, moved the Supreme Court of the State for a *habeas corpus.* The relief was refused by the Supreme Court and the commitment by the Chancellor sustained. The case was carried by writ of error to the High Court of Errors and Impeachments, where the judgment of the Supreme Court was reversed and Yates was discharged.

Yates was a man, it appears, of respectable standing, a master in chancery; both he and his counsel were manifestly much exasperated by the treatment he had received, and the conflict of opinion and action among the Judges had roused all their feelings to a high pitch. The Chancellor had now been convicted by the court of *denier resort* of having punished as a contempt an act which was not a contempt. According to the principle advanced on the other side, whether he had done this through ignorance or intention he was equally liable to impeachment. If such had been the opinion in New York, no man who follows these cases through the Reports of the State, from the 4th to 9th Johnson's Reports, and observes the spirit in which the controversy was carried on, can doubt that resort would have been had to the process of impeachment. But it seems to have entered into no one's mind that an impeachment would lie. The utmost that was dared was to attempt to

make the Chancellor answerable civilly in damages; and even this attempt, though carried through the whole range of the State courts, was finally repelled.

I have examined with all the attention and care in my power the various cases of impeachment of judges, both in England and the United States, and I have not observed that any counsel, even under the severest stress of the evidence, has taken refuge in so bold a proposition as this which we are considering—that error of judgment is an impeachable offense—on the contrary, I think it will be found on the strictest perusal of all the cases that have been cited, that the counsel on both sides have uniformly proceeded on the concession that the guilty intention is the gist of the impeachment. I will not detain you with an analysis of the cases with a view to this point—they have been already analyzed and are fresh in your recollections; and if the honorable Managers who are to reply have any thought of maintaining this novel proposition of their colleague, I ask them to refer to any passage in those trials, or to any authority of credit which lends to it even the weakest countenance. The honorable Managers have referred to a private opinion of Mr. Erskine on another part of this case. Permit me to give you his views on the question now under consideration. It is in his speech on the trial of the printer John Stockdale for a libel, and will be found on page 374 of the first volume of his speeches (New York edition of 1813). It is as follows:

"'The sum and substance, therefore, of the paragraph is only this, that an impeachment for error in judgment is not consistent with the theory or the practice of the English Government. So say I,—I say, without reserve, speaking merely in the abstract, and not meaning to decide upon the merits of Mr. Hastings' cause, that an impeachment for an error in judgment is contrary to the whole spirit of English criminal justice, which, though not binding on the

House of Commons, ought to be a guide to its proceedings. I say that the extraordinary jurisdiction of impeachment ought never to be assumed to expose error, or to scourge misfortune, but to hold up a terrible example to corruption and willful abuse of authority by extra legal pains. If public men are always punished with due severity, when the source of their misconduct appears to have been selfishly corrupt and criminal, the public can never suffer when their errors are treated with gentleness. From such protection to the magistrate, no man can think likely of the charge of magistracy itself, when he sees, by the language of the saving judgment, that the only title to it is an honest and zealous intention. If at this moment, gentlemen, or indeed any other in the whole course of our history, the people of England were to call upon every man, in this impeaching House of Commons, who had given his voice on public questions or acted in authority, civil or military, to answer for the issues of our counsels and our wars, and if honest single intention for the public service were refused as answers to impeachments, we should have many relations to mourn for and many friends to deplore. For my own part, gentlemen, I feel, I hope, for my country as much as any man who inhabits it; but I would rather see it fall, and be buried in the ruins, than to lend my voice to ruin any minister or other responsible person, however unfortunate, who had fairly followed the lights of his understanding and the dictates of his conscience for their preservation.

"'Gentlemen, this is no theory of mine; it is the language of English law and the protection which it affords to every man in office, from the highest to the lowest trust of government. In no one instance that can be named, foreign or domestic, did the Court of King's Bench ever interpose its extraordinary jurisdiction by information against any magistrate for the widest departure from the rule of his

duty, without the plainest and clearest proof of corruption; to every such application, not so supported, the constant answer has been: Go to a grand jury with your complaint. God forbid that a magistrate should suffer from an error in judgment, if his purpose was honestly to discharge his trust. We cannot stop the ordinary course of justice; but wherever the Court has a discretion, such a magistrate is entitled to its protection. I appeal to the noble Judge, and to every man who hears me, for the truth and unversality of this position. And it would be a strange solecism, indeed, to assert that in a case where the Supreme Court of criminal justice in the nation would refuse to interpose an extraordinary though a legal jurisdiction on the principle that the ordinary execution of the laws should never be exceeded, but for the punishment of the malignant guilt, the Commons, in their higher capacity, growing out of the same Constitution, should reject that principle and stretch them further by a jurisdiction still more eccentric. Many impeachments have taken place because the law could not adequately punish the objects of them; but who ever heard of one being set on foot because the law upon principle would not punish them? Many impeachments have been adopted for a higher example than a prosecution in the ordinary courts, but never for a different example. The matter, therefore, in the offensive paragraph is not only an indisputable truth, but a truth in the propagation of which we are all deeply concerned.'

"Thus much of the purpose of showing that the guilty intention charged in the impeachment is not matter of form but matter of substance; that it is a distinct and substantial charge; that it is the *mal a mens* which constitutes the very essence of the crime, and must be made out to the perfect and undoubting satisfaction of the Court before a sentence of guilty can be pronounced; that to establish it, it is not enough to prove that the act done

was without the authority of the law, for that this intention cannot be inferred from the mere illegality of the act; that mistake is no crime, and that so long as the act can, upon the evidence, be referred to mistake, a court of criminal jurisdiction will no more presume a guilty intention than a court of conscience will presume a fraud; and finally, that the guilty intention must be made manifest by the evidence beyond a reasonable doubt before a sentence of guilty can be pronounced. Indeed, I understood the learned Manager whose science and talents so long adorned the bench of New York to have admitted what his colleague denied, that mere proof of an unlawful act would not suffice, unless connected with proof of guilty motive.

"It is true that a judicial act may be so grossly and palpably illegal as to render it impossible to refer it to mistake, more especially if there be any proof of previous malice on the part of the judge against the defendant. For example: if on a trial for murder a judge were to instruct the jury that malice aforethought was no essential part of the crime; that there was no such thing as chance medley, no excuse for self-defense, such a palpable violation of a known and settled law of the land to procure the conviction of an enemy would justify the conclusion of a malignant and guilty intention. But on a nice question of law, where, amid the conflict, or apparent conflict of numerous authorities, different opinions may be fairly and honestly entertained in such a case as this, to infer a guilty intention from a mere difference of opinion would be an injustice so crying and horrible that every man would start back from the decision with dismay and execration."

The only circumstances claimed by the Managers as tending to show guilty knowledge or intent is the manner in which they claim the writ was ordered to be issued.

(Mr. Bynum then discussed the bearing on this case of the

failure of White to certify his accounts as directed by the Court:

1. The statute, chapter 19, Laws of 1899, requires the Auditor to audit accounts of the shell-fish commissioner upon the certificate of the secretary of the board, countersigned by the chairman.

2. The Court in its opinions directs that the accounts be certified in the way prescribed by the statute.

3. The judgment of the Court fixed the amount of White's salary per year, rate of mileage and extra expenses.

4. The writ of mandamus directs the Auditor to issue a warrant for the amount he may find to be due upon accounts presented to him, certified to him in the manner prescribed in the opinion.

5. Even if the General Assembly had prescribed a method of drawing his salary which was impossible to perform, such provision would have been void).

And now, Senators, having hurriedly gone through the charges which have been preferred against these Judges, having reviewed briefly and imperfectly their behavior since they came upon the bench, I invite you to look back upon their official lives and discover, if you can, anything so dark and criminal as to justify the infliction of the terrible punishment which would be involved in a conviction upon this impeachment. Where is the crime, where is the wrong they have committed?

One of them, a son of an honored father, whose name and fame are dearer to him than any other possession, has scarcely reached the meridian of life, with a bright prospect of usefulness before him. The other, a product of our native soil, rugged in his honesty and integrity, full of years and rich in the respect of his fellow-men, is fast approaching the evening of life. As Mr. Webster said of Judge Jay, when the ermine fell upon his shoulders it

touched nothing less white than itself. In their name, I say to you, as the great Hebrew judge said to the people of Israel in the olden time: "Behold! here I am, witness against me before the Lord and before His annointed. Whose ox have I taken? Or whose ass have I taken? Or whom have I defrauded? Whom have I oppressed? Or of whose hand have I received any bribe to blind mine eyes therewith?" And I trust the answer of this Senate will be like that which the people of Israel gave to Samuel. They said: "Thou hast not defrauded us nor oppressed us, neither hast thou taken aught of any man's hand."

Upon the evidence as it is, and as it will be laid before you, these Judges appeal with proud confidence to the Senate and the whole country to attest the purity and integrity of their intentions. While they do not claim that their judgment is infallible, while they do not pretend that they may not in their judicial experience have committed errors, as all judges must do, they do claim before this Senate and before the world that they are honest men, that they are men of integrity, that they are men of pure and upright motives. The acts for which they are accused were their judicial acts. Their decisions were such as duty called upon them to make, and they were bound to render such judgments as a conscientious conviction of duty demanded. And if they have mistaken the law, which they deny, it is such an error as every other judge which has ever sat upon any bench has committed.

The record of the American judiciary, Mr. President, is a history of which every citizen of our country may well be proud. It is a heritage priceless in value and belonging to us all. Lapse of years but adds to our reverence and affection for Marshall and Story, Kent and Miller, Taney and Field. Amidst the conflicts of parties and principles which raged so furiously around them they were calm and just, in wisdom and conservatism declaring the law as they

believed it to be, with an independence which knew no fear. Around some of them clouds and darkness gathered, but they soon passed away. Some of them were caricatured and bitterly abused; all of them were criticised. Even so enlightened a man as Jefferson himself wrote of Marshall as a "crafty chief judge who sophisticated the law to his mind by the turning of his own reasoning."

But to-day every American citizen who has any regard for his country, every judge and every lawyer who has respect for judicial independence and integrity, looks back with veneration and respect to the name of John Marshall. Nor is North Carolina without judicial heroes of her own. So long as judicial independence shall be admired, so long as judicial integrity shall be respected, so long will the names of Taylor and Henderson, Ruffin and Gaston, Pearson and Nash remain the pride not only of the bench and bar, but of the entire citizenship of this State. These were great judges, indeed, but they were great not on account of their native genius and ability alone, but because as judges and as men they were independent, unfettered and free. In times of political strife and unbridled party spirit the Court over which they presided, or of which they were members, was ever the conservative force that stood as a bulwark against the invasion of personal liberty and private property. Destroy this independence and you not only place a shackle on every judge's seat but you endanger the rights of the citizen himself. The question before this Court does not concern Judge Furches and Judge Douglas alone. It is the question of the independence of the judiciary of North Carolina which alone has the right to pronounce, interpret and expound the law of this State. It is in the person of these respondents that this independence may here be violated. You are asked to place upon their judicial acts a construction which may be a precedent for evil in the years to come. In the

language of Mr. Webster at the trial of Judge Prescott, "I may perhaps overrate the importance of this occasion to the public welfare, but I confess that it does appear to me that if this body give its sanction to some of the principles which have been advanced on this occasion, then there is a power in the State above the Constitution and the law—a power essentially arbitrary and despotic, the exercise of which may be most dangerous. If impeachment be not under the rule of the Constitution and the laws, then may we tremble not only for those who may be impeached, but for all others. If the full benefit of every constitutional provision and every rule of law be not extended to the respondents, their case becomes the case of all the people of the Commonwealth. The Constitution is the people's Constitution; they have made it for their own protection and for these respondents among the rest. They are not eager for their conviction. They desire not their ruin. If they be improperly condemned, then not only are they condemned, but the rights of the whole people are disregarded."

At the conclusion of Mr. Bynum's argument, on motion, Court thereupon took recess until 3 P. M., and the Sergeant-at-Arms made due proclamation accordingly.

Afternoon Session.

The Court of Impeachment reconvened at 3 o'clock p. m.

Sergeant-at-Arms makes due proclamation.

The Clerk calls the roll, showing forty-nine Senators present, as follows:

Alexander, Arrington, Aycock, Bray, Broughton, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

The PRESIDENT: "The Court is ready to proceed to business. Call your witness."

Mr. LONG: "Will ask the Chief Justice to take the witness stand."

Chief Justice FURCHES, *a witness called in behalf of the respondents, being duly sworn, testifies as follows:*

By Mr. Long.

Q. Where were you born? A. Davie County, North Carolina.

Q. Where have you resided? A. I lived in Davie County until about September, 1866, when I moved to Statesville, and have resided there ever since that time.

Q. What has been your profession? A. That of the law.

Q. How long have you been engaged in the practice of the law? A. I got my Superior Court license in January, 1868. I at once settled at Mocksville, where I remained until I went to Statesville. I went to Statesville and entered the practice there, and continued in the practice until 1875. At that time I was appointed one of the Judges of the Superior Court in place of Judge Mitchell, who had resigned. I held that office for three years, and then I went back to the practice. I have been engaged in the practice from that time until I was elected to the position of Associate Justice of the Supreme Court, in 1894. I suppose I did not quit the practice until the end of that year, because I did not qualify until January, 1895. After I was elected I took some practice.

Q. You served then as Associate Justice of the Supreme Court until you were appointed Chief Justice; and you were appointed Chief Justice when? A. I was qualified on the 7th day of January, 1901.

Q. Since you have been upon the Supreme bench, are you able to state how many of these cases involving the title to office have been before the Court? A. There has been quite a number of them, and since this question has been up here I have gone over and made a memorandum of those I could recollect.

Q. Will you be kind enough to state, if you can, such as you recollect of these cases that involve the title to office, and such as involve the question as to the emoluments of the office, and, if you can, state title and emoluments as you go on? A. The first term, after I was qualified, was February Term, 1895. At that time I don't think there was but two cases before us. It might be called the office cases, or involving title to office. One of them was *Ewart v. Jones.* That involved the judgeship of the Western Criminal District. It was decided in favor of Judge Ewart, and Judge Faircloth wrote the opinion of the Court. It was a unanimous opinion; there was no dissent in that case. The other case that came before us at that time was *Cook v. Meares.* That involved the right of the office of Judge of the Eastern Criminal District. It was decided in favor of Judge Meares, and I wrote the opinion; that also being a unanimous opinion of the Court.

Q. Do you remember who were the members of the Court at the time those two opinions were rendered? A. Yes. At that time Judge Faircloth was Chief Justice; Judge Avery was the next Associate Justice, Judge Clark was next, I was next, and Judge Montgomery, when those two opinions were rendered.

Q. Now, can you recall the next case in order that oc-

curred to you, involving these questions? A. The next case that came before us was at the next term, 117 North Carolina; that of *Stanford v. Ellington.* That involved the title of the librarianship of the State Library. It was decided in favor of Ellington, and against Stamford. I wrote the opinion in that case. It was put upon the grounds that Stamford was elected by the Legislature, but it was put upon the grounds that there was not a quorum present when he was elected. That opinion was also unanimous.

Q. Do you remember who was on the bench at that time? A. The same Justices that I have just mentioned.

Q. Please state the next case that occurs to you? A. There may have been some other cases in which the opinion of the Court was rendered, but the next case I have is *Wood v. Bellamy,* 120 North Carolina, 212.

Q. Who was on the bench at that time? A. At that time Judge Avery had gone off the bench and Judge Douglas had succeeded him, and the Court was the same as when the other opinions were delivered, composed of Chief Justice Faircloth, Judge Clark, myself, Judge Montgomery and Judge Douglas. All of the other cases, in order to shorten this examination, were decided by the same Judges that I have just named. The change took place before the case of *Wood v. Bellamy* was decided.

Q. What was the question involved in the case of *Wood v. Bellamy?* A. This involved the title of the right to control and manage what was called the Eastern Hospital. That is, the asylum here at Raleigh. It was decided in favor of the defendant. Judge Montgomery wrote the opinion, and the opinion was unanimous; there was no dissent. The opinion was put upon the case of *Hoke v. Henderson,* and the opinions following *Hoke v. Henderson* in this State. At the time these cases were heard and argued, or before it, there were two other cases on the docket: one involving the title

and management of the Western Hospital, that is, at Morganton, as I understood, and the other involving the Eastern Hospital at Goldsboro. The one against the Western Hospital was entitled *Lusk v. Sawyer,* and the one against the Eastern Asylum, *State v. Sutherland.* These three all appear in 120 North Carolina, and the two laws on the 125th page, because there were *per curiams* put upon the decision or opinion of *Wood v. Bellamy,* involving the same question. There was no opinion written in those three cases.

Q. If I understand you then, these three cases of *Wood v. Bellamy, State v. Sutherland* and *Lusk v. Sawyer,* involving the title to the management of the three hospitals of the State, one in Raleigh, one in Morganton, and the one in Goldsboro, and the effect of these opinions were to retain the officers then in their offices, and defeat recovery of the plaintiffs? A. Yes; in the decision of *Wood v. Bellamy,* followed in *Lusk v. Sawyer* and *Person v. Sutherland,* the institution remained in the hands of its former managers, and those that were attempting to be placed in charge of them by the Legislature of 1897, I believe it was, were defeated, upon the grounds, although they had attempted, by the language of the enactments, to abolish the institutions, and to establish another, and to call it by a different name, and to call its officers by a different name. It was held in that case, that that did not change the law; it did not in fact abolish it, because the same institution was carried on, and it did not change the nature of the service, but the effect would simply have been to change the officers controlling the institution, and we held that that being the only result of it, that it could not do that, because the doctrine of *Hoke v. Henderson* came in and said that they could not dispense with them that way. That it was taking the office that these people had by legislative enactment and giving it to other parties. Those three opinions were unanimous. There was no dissent in either one of them.

Mr. LONG: "The information is communicated to us that there is some difficulty about hearing your answers, and we will be glad if you would talk a little louder."

Judge FURCHES: "I will do the best I can. I have been suffering from bronchitis for two weeks, and I have been trying to get ready for this thing. I am not well yet, but I will do the best I can. I have been trying to do the best I could to be heard."

Q. The next case of this kind, Judge, if you please, go ahead and state. A. The next case that I remember is *Ward v. Elizabeth City,* 121 North Carolina, 221. This was not an action involving the title to an office, but it was an action involving the claim of a salary to an office, and it was thought that it fell under the same rule, to a certain extent, of the other cases, because this principle put upon the doctrine of *Hoke v. Henderson* and *Wood v. Bellamy.* They are cited, and I believe one of them is some quotation from it. That was decided for the defendant. Judge Clark wrote the opinion of the Court, which was unanimous, no one dissenting in that case. The next case that I have, is the case of *Caldwell v. Wilson.* That was a case that has had some notoriety, and I suppose all of the Senators, who are lawyers, remember it distinctly, because it was a case that was very much discussed. It was where Governor Russell had suspended Mr. James W. Wilson and Mr. Otho Wilson from their office as Railroad Commissioners, and had appointed Mr. Caldwell. They refused to vacate their office, and Mr. Caldwell brought his action to recover the office. It was decided in favor of the plaintiff. Judge Douglas wrote the principal opinion in that. Judge Clark wrote a short opinion, concurring. It was more in the nature of an executionary judgment, as you will find in the books. This opinion was not unanimous. That is, it was concurred in by Justice Clark, myself, Justice Montgomery, and Justice Douglas; Judge Faircloth in that

case dissenting. That case, I believe, is the case with which judgment was directed to be entered in the Supreme Court, and execution issued from that Court. The next case that I have here is the case of *Cromartie v. Parker,* 121 North Carolina, page 198. This was an action brought to have the office of the defendant declared vacant, for the reason that they, as County Commissioners, had elected themselves school committeemen, and it was alleged they were the Commissioners of Bladen County, and it was alleged in the complaint by the plaintiff, who said that he was a citizen of the county, to have their office of County Commissioners vacated upon the allegation that the two offices were inconsistent. They had no right to elect themselves to any office while holding one office, and this Court so held. There was no division of the Court in that; the opinion was unanimous. They ousted the defendants, because they said it was incompatible, and that they had no right to elect themselves to the office.

The next case I have noted, is the case of *Shannonhouse v. Withers.* This case, it is true, involved a question of office, but it was more the election of the officer, I think, than any other legal question in it. It was a contest between these parties as to which one had been elected cotton-weigher, or some office of that kind, in the town of Charlotte. It was decided below, in my recollection, for the defendant. That judgment was reversed, and a new trial was awarded. There was no dissent in that case.

The next case that I have, is the case of *Harris v. Wright,* 121 North Carolina, 172. That involved the right of mayoralty of the city of Wilmington, and in that was involved also the question as to whether the Legislature could elect a part of the aldermen, is my recollection. In this case Judge Faircloth wrote the opinion; there was no dissent. Judge Clark and Judge Montgomery both wrote concurring opinions.

The next case I have, is *Barnhill v. Thompson,* 119 North Carolina, 493. This case involves the same questions I have spoken of before as to the County Commissioners electing themselves School Committeemen. And as I said in the other, there was no dissent in that; it was a unanimous opinion. The opinion was written by Judge Faircloth. This, I think, is the same case as from Bladen, and was heard the second time. The same office and the same question being involved, and the same parties, though I believe, as it is reported in the books, that probably it may be reported by a different name; I think it was.

The next case I have, is the case of *Houghtaling v. Taylor,* 122 North Carolina, 140. This case was from Vance County, and involved the right of the defendants to hold the office of County Commissioners.

Judge Graham, under the Act of 1895 and 1897, had appointed the defendants additional County Commissioners in that county, and the old Commissioners brought a suit to turn them out: "that you had no business in here with us," controlling our legislation or order, and the old Board brought a suit against the appointees of Judge Graham, and it was decided against the old Commissioners, and in favor of the new appointees. There was no division of the Court in that case, as is my recollection.

Mr. LONG: I think, perhaps, you are mistaken about that. I call your attention to the fact that Judge Douglas dissented; however, the case will show. Perhaps you were looking at the wrong memorandum. A. Yes, I was looking at the wrong memorandum. Judge Douglas did dissent, but the other four members of the Court agreed to it. I am glad you called my attention to it, Mr. Long.

The next case that I remember, is the case of *Holt v. Bristow,* 122 North Carolina, 245. In this case was involved the right of the parties to be directors in the Morganton Deaf

and Dumb Asylum. The plaintiff, Holt, had been elected a director, but the Legislature had met and failed to elect his successor, and the Governor, concluding that there was a vacancy, as the Legislature did not elect, appointed the defendant, Bristow, as a director. Mr. Bristow entered and Mr. Holt brought a suit, claiming that though he was not elected by the Legislature, he had a right to hold office, and that there was no vacancy for the Governor to fill at the time the appointment was made. That was the question involved, and the Court, after considering it as well as we could, sustained the claim of Mr. Holt, and said that he had a right to hold over, and that there was no vacancy for the Governor to fill, and decided in Mr. Holt's favor.

Q. Do you remember whether there was any dissent in that case? A. No; none at all. I wrote the opinion, but it was unanimous; there was no dissent. That case was 122 North Carolina, 245, decided at the February Term, 1898. If there is any member interested in the trial, I think I can give him the terms of the Court in this matter.

Mr. POU: "No, we can get that from the books."

Judge FURCHES: The next case that I have that falls under the same doctrine, as I understand, though it did not involve title to office, is the case of *Worth, Treasurer, v. Stewart Brothers,* who were the Public Printers of the State at that time. They had, as it was alleged by the Treasurer, by means of false representation, got the Auditor and Treasurer to pay them money that they were not entitled to, and they demurred. Mr. Burton, I recollect, represented them. We all remember the noble gentleman and fine lawyer. They demurred to the complaint. We overruled the demurrer, and decided against them; that they were public officers, and that they could not be allowed to do that, and defraud the government.

The next case is two cases of *Worth, Treasurer, v. Stew-*

art Brothers, involving the same question, only in the last cases it was upon the bond, and they held that their bondsmen would not be liable. We held that they would be liable. There was no dissent there; they were both unanimous. I wrote those opinions.

The next case I have note of here is *Ryan v. Lipscomb,* 122 North Carolina, 655. This case did not involve the question of the right to hold an office, but it involved the question of the right of Judge Ewart to exercise jurisdiction that had been attempted to be given him by the Legislature of 1897. The Legislature of 1897 had undertaken to confer upon Judge Ewart criminal jurisdiction. The Court decided that it could not do it, and so far as attempting to do so, that the act was unconstitutional and void. That opinion was written by Justice Clark, but it was unanimously concurred in by the Court. No dissenting opinion in that. That case was decided at February Term, 1898.

The next case that I have is what is called Day's case, or the *State Prison v. Day. This* was a question involving the right of the plaintiff to be Superintendent of the State Penitentiary. I think he had been appointed a short time before the Legislature met to that office upon the resignation of Mr. Mewborne, or somebody, and the Legislature had undertaken to recognize in 1899 this institution and provide for the government of the institution by a board of directors, and they had taken control of the institution and Day brought his suit, maintaining that he was entitled to hold the office for the next two years under the appointment that he had. This case came before us at February Term, 1899, and here a division of the Court commenced upon all, I might say, of the questions involving what has been termed here by counsel "the office-holding cases." That is the case involving the right of the office, or the right of the party to pay. In this case it was decided in favor of the plaintiff, Day. Judge

Montgomery wrote the opinion, and put it upon the doctrine of *Hoke v. Henderson, Wood v. Bellamy,* and other cases that have been decided by this Court, as he understood them, involving the doctrine of *Hoke v. Henderson* and *Wood v. Bellamy.* Judge Clark dissented. That was the first time there had been a division of the Court, except when Judge Faircloth dissented in the case of *Caldwell v. Wilson,* and Judge Douglas in the case of *Houghtaling v. Taylor.*

The next case was *Wilson v. Jordon,* 124 North Carolina, 686. This was also decided at February Term, 1899. This involved the title to the clerkship of the Criminal Court of Buncombe County. The plaintiff having been elected by the people for a term of four years, the Legislature of 1899, passing another act, making the office and appointing a Judge, and authorized him to appoint a clerk, and some other differences that will appear in the act, which was not considered material by a majority of the Court, and in that act Judge Stevens exercised the authority which he thought was given him by the Legislature, appointed Jordon as clerk of that court, and Wilson brought suit, claiming that he was clerk, and could not be taken out of the office in that way, under the doctrine of *Hoke v. Henderson.* It was decided by the Court in favor of the plaintiff Wilson, Judge Clark again dissenting.

The next case that I remember is *Cherry v. Burns,* 124 North Carolina, 761. That was also decided at the Spring Term, 1899. That involved the office of Keeper of the Capitol here. Mr. Cherry was elected—or appointed—any how, he came into the office as considered properly; I believe he was elected by the Legislature. Mr. Burns had been appointed before, and his time would have been out at that time, but he contended that it was a constitutional office. I remember now that the Legislature provided that Cherry should be elected, and they made two questions, one was that

it was a constitutional office, and the other provided for the constitutional office that had been provided by the Constitution, and given to the Governor. That this act changed that, and it had no right to do so because it was a constitutional office. And another point in the case was that the Legislature, while it might be that the whole body could elect, it could not delegate its power to the Senate to elect. The question came before us, we considered it; we decided for the plaintiff, Cherry, who was elected by the Senate of 1899, holding that it was not a constitutional office. And I remember very well in doing that I wrote the opinion, that it was necessary to overrule what I called in the opinion, and that now was the opinion of Judge Pearson in the case of *Bledsoe v Wilkie*. He expressly named the Keeper of the Capitol as a constitutional office, but, upon considering the question, we thought it was not necessary to the opinion that the Chief Justice was giving at that time. That is was probably inadvertently stated that we did not see anything in it to constitute it a constitutional office. And, therefore, the Court overruled Judge Pearson in that respect, and decided it in favor of Mr. Cherry.

Q. Judge, I want you to refresh your recollection as to whether or not there was any dissent in that case? A. No; there was no dissent.

Mr. LONG: Q. You delivered the opinion, and there was no dissent, is your recollection? Refresh your recollection from the volume if you want to see it. A. No, sir; there was no dissent. It may be because it was decided for Mr. Cherry, that it was unanimous. I don't say that was so.

The next case I have is *Cunningham v. Sprinkle*. That is Colonel Cunningham, as I understand. That involved the right to hold and exercise the office or offices of the Agricultural Department. Mr. Sprinkle was one of the old Board. Colonel Cunningham and his folks had been elected or ap-

pointed by the Legislature of 1899. Mr. Sprinkle refused to give up, and Colonel Cunningham brought his action against him for the control of the offices. It was decided in favor of Colonel Cunningham, and against Sprinkle. Judge Douglas wrote the opinion, which was a unanimous opinion of the Court.

Q. Do you remember, or not, in that case the Court sustained a peremptory mandamus? You can refresh your memory if you desire. A. Yes; it was one of the *quo warranto* actions for mandamus.

Q. It was sustained by this Court? A. I was not advertent to that.

Mr. LONG: Q. The next case now, Judge, if you recall it. A. The next case I have here is *Abbott v. Beddingfield,* 125 North Carolina, 256. This involved the title of the plaintiff to the office of Corporation Commissioner. The Court decided it in favor of the plaintiff, all the Judges concurring except Justice Clark, who dissented. The opinion in this case was considered by the Court to involve the doctrine of *Hoke v. Henderson* and *Wood v. Bellamy,* and it was put upon that doctrine. The opinion was concurred in by four of the Justices. I wrote the opinion—that is, the leading opinion—and Justice Clark dissented.

The next case I remember is *McCall v. Webb,* 125 North Carolina, 243, Spring Term, 1899. This case involved the Solicitorship of the Criminal Court of Buncombe County. It was decided in favor of the plaintiff, all the Justices concurring, except Justice Clark, who dissented. This case was principally put upon the case of *Wilson v. Jordan,* because the same argument and evidence were so near the same.

The next case that I have is *McCall v. Zachary.* This involved the Solicitorship of the Criminal Court of Madison County, and it depended upon the decision of the case above —*McCall v. Webb*—because it refers to the other case in the

question involved in this case. I wrote this opinion, concurred in by four of the Justices; all of them except Judge Clark, who dissented.

The next case I have is *McCall v. Gardner, Eaves, Avery, Jones and Griffin.* This case involved the Solicitorship of McDowell, Burke, Yancey, Caldwell and Forsyth counties. In this case it was decided in favor of the plaintiff, as far as McDowell County was concerned, because that was in his district, and he had been acting there before the act of 1899 was passed. As to the other counties—McCall never had any jurisdiction there, and it was held, as to those four, in favor of the defendants. It is proper that I should state to this Court that Mr. Jones, the Solicitor in Caldwell County, though he was in the same action, that he was not before the Court when this case was decided; his part of it being continued by the Judge, on account of relationship between them.

Q. Was there not dissent in that case? A. In this case there was no dissent as to that part of the opinion that referred to Gardner and Avery and Jones and Griffin, but there was a dissent by Justice Clark as to that part of it which decided against Eaves, and in favor of the plaintiff.

The next case I have is *White v. Hill,* 125 North Carolina, 194. This case involved a right of the plaintiff to the office of Shell-Fish Commissioner. It was decided in favor of the plaintiff, all the Justices concurring except Justice Clark, who dissented; Justice Faircloth writing the opinion of the Court. It, too, was put upon this doctrine of *Hoke v. Henderson,* and that line of cases.

The next case I have is the case of *Green v. Owen,* 125 North Carolina, 212. This was also decided at the February Term, 1899. This case arose under the school law, involving the right of the plaintiff to hold and exercise the office of School Committeeman. It was decided for two of the plaintiffs, and against one of them. The plaintiffs were

the old Board. Decided for two of them, and against one of them. Justice Clark dissented in this case, as to the two, that was decided in favor of the two plaintiffs.

The next case I have is *Bryan v. Patrick,* which was decided in 124 North Carolina, 161. It would have been proper to have brought this in sooner, but thinking over it, I notice I did not get it in there. *Bryan v. Patrick,* 124 North Carolina, 161. This case involved the right of the plaintiff to the presidency of the Atlantic and North Carolina Railroad Company, and was decided against the plaintiff. Chief Justice Faircloth wrote the opinion, Justice Clark dissenting; all the others concurring, except Clark.

Railroad v. Dortch, 124 North Carolina, 623. This case was considered with the one I have just mentioned of *Bryan v. Patrick.* Involved the right of the defendants to act as directors, the plaintiff's title depending upon whether the directors had the authority, at the time he was elected, to act. It was held that they did not have, and against Mr. Dortch. In this case Justice Clark and Justice Montgomery both dissented.

In the next case is *Darby v. Hancock,* 125 North Carolina, 325. This case involved the plaintiff's right to hold and exercise the office of School Committeeman. Decided in favor of two of the plaintiffs and against one of them. Justice Faircloth wrote the opinion of the Court, Justice Clark dissenting as to those plaintiffs that it was decided in favor of.

The next case I have note of is *Gattis v. Griffin,* 125 North Carolina, 332. This case involved the office of School Committeeman, and was decided for the old Board. Justice Faircloth wrote the opinion of the Court, Justice Clark dissenting.

The next case I have is *White v. The Auditor.* That is the case in which the mandamus was issued. It was decided

for the plaintiff. I wrote the opinion of the Court, Justices Clark and Montgomery dissenting.

The next case is *White v. Murray.* This case involved the right to hold and exercise and take the emoluments of the office of Clerk of the Criminal Court of Madison County. They had established a court there, and authorized Judge Stevens to appoint a clerk. He appointed Mr. Murray clerk of that court. The clerk thought he was enttiled to that office. The Court decided against Mr. White, plaintiff, by unanimous opinion, and Justice Clark wrote the opinion.

The next case I have is *McCall v. Gardner,* noted on the back "No. 2, 126 North Carolina, 173." This was decided for the defendant, Gardner. I wrote the opinion of the Court, and Justice Clark wrote a concurring opinion. It was unanimous.

The next case I have is *McCall v. Webb,* noted on the back "No. 2, 176 North Carolina, 760." This involved the plaintiff's claim to the fees while Webb was in the office, under the appointment of Judge Stevens, and it was decided in favor of the defendant. I wrote the opinion, Justice Clark concurring in written concurrence.

The next case is the case of *Mott v. The Commissioners of Forsyth County.* This involved the right to have a grand jury in the Superior Court of Forsyth County. It was decided in favor of the plaintiff that there must be a grand jury. I wrote the opinion, putting it principally upon the case of *Ryan v. Lipscomb,* that has been referred to. Justices Clark and Montgomery dissented.

The next case is *Mott v. Griffin.* Griffin was Solicitor of the Criminal Court, and Mott claimed that he was the Solicitor of the District, and that Griffin had no right to receive the salary. It was decided for Griffin.

The next case I have is *Wilson v. Neal.* Wilson was the

Clerk of the Superior Court, and Neal Clerk of the County Court, appointed by Judge Stevens. This was decided in favor of Neal. These two last cases, *Mott v. Griffin* and *Wilson v. Neal,* was a unanimous decision, no dissenting. These are the cases as far as I remember them now.

Q. I wish you would state whether or not in arriving at the conclusions you had arrived at in any of the cases under the acts of '95, '97 and '99, you were in anywise influenced in arriving at your conclusions by reason of the political affiliations of the parties to the action, or any other considerations than those arising upon the law, and the questions presented? A. I am satisfied that I was not influenced by any such considerations in these cases, or in any other cases that ever came before me. If I was, I was entirely unconscious of it, and I do not believe that I was unconsciously affected by it. I don't believe that I was influenced by any such consideration. Of course, by the nature of these cases, we would have to know something about the politics of the parties. That was all that I knew about it, and I always preferred not to know politics when I was deciding a case.

Q. State if at the request of your counsel during the process of this investigation, and by enquiry of them, or otherwise, you have been able to learn and note as to the number of these cases that were decided favorable to parties opposed to you in politics, and the number of those that have been decided favorable to those who have hitherto affiliated with you politically? A. I never noted or paid any attention to it, and had no knowledge. I knew that they had been decided both ways, until this thing has been on hand, and at the request of counsel, in looking over the cases in the memorandum which I have been going over, I have, as well as I could, not knowing, only from the character of the cases, what the party's politics were, come to the conclusion, that there is a majority of the cases that I have acted in as a

Court, since I have been upon the bench, decided against the party that I affiliated with in politics, but I never had noted or thought of it until this matter came up, and then only did it at the request of my counsel. I think out of thirty-eight or thirty-nine cases mentioned, that there has been some twenty-three or twenty-four in favor of the other side, as I would judge from the character of the cases, and nothing else. I knew nothing about their politics.

Q. State to the Court whether or not in any of these opinions that you have written or concurred in since you have been on the Supreme Court bench, you ever had any purpose, intention or desire to render an opinion as to any of the acts of the Legislature so as to treat their acts and conduct disrespectfully or contemptuously? A. I never have. I felt it my duty, acting as an independent Judge, to hold that some of the acts of the Legislature were unconstitutional, or that they were unconstitutional to the extent that they affected the rights of the parties, but I considered that my right, and I thought I was sustained in that, probably, by every Judge that ever had sat upon the Supreme Court bench of North Carolina since its organization. I never knew it to be doubted but what the Court had the undoubted right, if they thought an act of the Legislature unconstitutional, to say so, but I had no desire to do so, no intention to bring them into disrepute. In fact, I thought that some of the constructions I was giving to some of their legislation was to decide the question, and wherever the question before me could be decided, as I thought, although there may be an unconstitutional question involved in it, I have tried to avoid passing upon that unless it was in the argument of some case, where it was involved, as I think, for the benefit or to strengthen the argument that I had made.

Q. Now, we will come down to this case here, of *White v. The Auditor*. Wish you would just take up that case,

Judge, and state in your own way, if you remember, when it was argued, and what happened there in the argument, and afterwards in regard to the mandamus involved that you know and remember about. A. Well, of course, I may not be entirely accurate as to data. I think you have that from Colonel Kenan, and, of course, he has kept that in a way that he has a more accurate knowledge of the dates than I have. I defer to him for that; that is, for the dates.

This case was docketed at the Fall Term of the Court, 1899. That is my recollection of it. It was asked to be advanced by both sides. It was advanced; I don't remember that there was any objection. The counsel on both sides were asking for it, and I don't remember that there was any suggestion not to advance it. It was advanced and argued during the Fall Term of Court. It was getting late in the term of the Court, and the case went over by an *advisari*, and was decided at the next term. I would not have recollected that, if I had not heard the testimony here of Colonel Kenan. I knew nothing more of this after it was decided and judgment filed. It was getting then towards the end of the February Term. I went home, and I knew nothing else about it until the next term of the Court. It was Fall Term. One day, some time after the Court met, the Fall Term—I believe it has been stated here, about the 4th of October—Mr. Harris, acting as attorney for the plaintiff, came into Court and asked the Court for a writ of mandamus, saying that Mr. Ayer would not give him a warrant, and Mr. Worth would not pay it without it. Chief Justice Faircloth was, by the courtesies of our Court, and I believe, by the law of our Constitution, regarded as the speaker of the Court. That is, the proper one to speak for the Court, though all of us had that right, and sometimes exercised it. The Chief Justice said to Mr. Harris, "Have you given notice to the other side of this motion? We can not hear it unless you

do." Mr. Harris turned around and walked off. That is all that I recollect that was said at that time by any member of the Court. The Court was then a full bench, is my recollection. In a day or two Mr. Harris appeared in Court again, and Judge Charles Cook also appeared in the Court. Mr. Harris said he had come back to renew his motion for a mandamus; that Colonel Cook was present, who represented the other side, and waived the notice. No one spoke immediately. And then I said, "Mr. Harris, have you any written motion or affidavit for this motion?" He said, "No; I have got no writing; did not think it was necessary to have it." "Well, I said, this case was disposed of at the last term of the Court. It has gone off the docket, and there is nothing before the Court that the Court, as a Court, can act upon." He seemed not to have any reply much; said he thought he was entitled to it, without anything further. Judge Montgomery then spoke and said, pointing his finger to Colonel Harris, "Why don't you go to the Clerk if you want a mandamus?" Mr. Harris walked out of the Court. I heard nothing more of the mandamus for a few days. One evening, a few days after that, after we had adjourned—we had been in conference—as I was walking out through the aisle leading to the front door, Colonel Kenan came out of his office, and said to me, to use his language: "Loge Harris has been bothering in this case of *White v. Treasurer*. He says he has never made any proper application until now, and I am going to grant it." I said: "Very well, I think it is your duty to do it, if he has made application." I walked on out, and went to my room. I thought nothing of it, and never mentioned it to my associates, Judge Faircloth and Judge Douglas, who had rooms near me. A few days after that, after I had eaten my supper and commenced my work, Judge Faircloth walked around to my room, and he had in his hand a typewritten form of mandamus.

Mr. POU: "We will object to any declaration that Chief Justice Faircloth made."

Judge FURCHES: I will say it was a part of the conversation. If course I don't want to say anything that I ought not to say.

Mr. POU: "We withdraw it."

Judge FURCHES: He walked around into my room with a typewritten copy or form, as you might say, of mandamus. He says to me, "Kenan is going to issue the mandamus in the case of *White v. Worth,* and he has given me this paper and asked me to look over it and see if it was correct. Look over it and see what you think of it." Of course I did it. I think if Colonel Kenan had requested a thing of that sort, I never thought but what I would do it. I took the paper and read it. After I read it, I said, "Well, I think there ought to be some changes in this," and undertook to tell him what I thought, and to point out what I thought ought to be changed. He said, "Take your pencil and interline it," and I don't know but what I took my pencil and did make some interlineation. I found there was too much to interline it, and I said so to him. He said for me to draw up one that I thought would make it proper. I took my pencil and turned around to the table, and wrote what I considered would be a proper form, or at least substantially so. But before I got it done, he said, "I want to go into my room. As soon as you get it done, bring it around." I wrote it and took it around, and he read it. He said, "I think that is all right." As that was only a form suggested as to the Auditor, I then suggested that we had better tell Colonel Kenan to use this as far as was proper, and he could use this by drawing one on the Treasurer. I stooped over and wrote a little matter on the back of it; I don't recollect exactly the language I used. I would like to see it.

Mr. Manager ALLEN: "The paper has been misplaced

and we have been unable to find it, but we will look for it, and give it to you later."

Judge FURCHES: Anyhow, I wrote it, and left it, together with the typewritten paper that he had given me, with Judge Faircloth, and that is the last that I ever knew of that paper until since that time when the matter has been discussed here about the mandamus. I don't know whether he gave it to Colonel Kenan, or whether he sent it to him by a messenger, or how Colonel Kenan got it. All I know about it, is that I left it with Judge Faircloth in his room. That was the last time I saw it.

Q. Up to that time, Judge, had there been any differences expressed by the Judges themselves as to the issuing or not issuing except these former motions that you speak of? A. I want to say that I would like to have that paper, if they can do it, because my recollection is that I signed my name to it, "Furches." It was signed on the back of the paper, and I think I signed my name to it.

Mr. Manager ALLEN: "That is the paper that we spoke of the other day as having been mislaid, but the copy of it is here."

Judge FURCHES: "Have you got the copy of the memorandum?"

Mr. Manager ALLEN: "I have not."

Judge FURCHES: "I would be glad if you would find it, because, I think, that that would show that I was not doing it in any secret or clandestine way. I am not sure about it, but my recollection is that I signed it."

Mr. LONG: "We will wait until they get the paper."

Mr. COOK: "Judge Allen, does your copy show the endorsement on the back? A. Yes; it shows that the endorsement was on the back and what the endorsement was."

Judge FURCHES: "My recollection is that it was written on pencil paper."

Mr. LONG: Had anything happened in the conference of the Judges in the Supreme Court room except these motions that you speak of Colonel Harris having made there, up to the time this paper was handed you by Judge Faircloth. A. None that I recollect, except what Mr. Harris had said in Court and what had been said to Mr. Harris in Court.

Q. Proceed from the point where you left off and follow up any transaction after that in regard to that writ. A. Well, I don't know whether it was next morning or next evening, or the evening following, after I had written the form, Colonel Kenan came to my room and gave me a typewritten paper, which has been styled here a "protest and opinion," protesting against and ordering and directing Colonel Kenan not to issue this writ. The next time we met in conference after that—I don't know whether it was that same day or not—but soon afterwards, when we met, Judge Clark says: "I suppose you have all gotten my protest and opinion." I think all of the Court responded that they had. The matter was then discussed some, and I saw that he stated that he wanted it spread upon the minutes, what he called his letter of protest and his opinion to be published in the next number of the Reports, No. 127. I says: "Judge Clark, you can do what else you please with that protest and opinion," and I think I said: "You can publish them in the newspaper if you want to, but with my consent they shall not be spread upon the minutes, nor published in the next number of the Reports. There is nothing before the Court for the Court to act upon as an organized court. There is nothing before the Court for you to dissent to or to make a written protest, filed and spread upon the minutes." I think all the other Judges concurred in that. My recollection is that Judge Montgomery said much more than I did. He was standing on the same side of the conference table with Judge Clark and he turned his face to him and said: "Judge

Clark, you can not file that protest or put your opinion in the Reports with my consent. You have been filing opinions here, political opinions, that you ought not to have filed, and it is getting time to stop." They are his words, as near as I can recollect, and certainly they convey the purport of what he said. The discussion there closed without regard to the question of whether they should be put upon the minutes or published in the reports. Colonel Kenan then comes in, probably that day, and he says: "I want the Court to give me some instructions about this matter. I want to do my duty as a Clerk; I want to obey the wishes of the Court. There seems to be some division here, and I want to know how you all are." I said: "Colonel. Kenan, there is nothing before the Court that the Court can act upon as a Court. This case was disposed of at the last term of the Court and went out of here, and there is nothing before us that we can give you an order or a judgment of this Court as a Court, but as far as I am concerned, as an individual member of this Court, I have no hesitation in saying to you what I told you the other day—'that I think it is your duty to do it; that the opinion of the Court at its last term directed you to do it, and it is your duty to do it.'" Judge Faircloth said substantially the same thing, probably not in the language I did. I don't think Judge Douglas at that time expressed an opinion. I don't think Judge Montgomery expressed any opinion. Judge Clark said he did not think they had a right to do it, as he had said in his protest, as he called it. That night, I think it was—it may have been the next night—after this occurred, I happened to be in Judge Douglas's room and Colonel Kenan came in and he commenced asking about these things; seemed to be disturbed about it; expressed himself as having a desire to do his duty as a Clerk. I said: "Well, Colonel Kenan, I have told you what my opinion about it was; do you think I am going to go back on that, or

that I will ever say that I did not tell you that?" He said, "No, he did not think anything of the kind, but it was troubling him and he wanted it settled." Judge Douglas then took from his desk a paper and read it to Colonel Kenan, and though I have not the means of knowing it was this paper, I think it was the paper read here the other day and shown to Colonel Kenan. Colonel Kenan came in after that, the next day, and wanted the advice of the Court as to what he should do. I repeated as near as I could what I had said before. We were in conference, all of us, there; we were not on the bench. We were on the bench when Mr. Harris was in there, but never any other time. I told him that we had no jurisdiction as a Court, and repeated what I said as an individual member of the Court. Judge Douglas then repeated to him, as well as I recollect, it was in substance, I am satisfied, what he had read to him from that paper the night before in his room. Judge Faircloth gave it as his opinion that the opinion had decided it in the judgment and it was his duty to issue the writ. Judge Clark said that he did not think we had a right to do it, and Judge Montgomery said he did not think we could do it; anyhow he did not dissent to it. Colonel Kenan then went out and I knew nothing more about it until after I heard the writ was issued; that it had been served, and that the money had been paid, and that is all that I know.

Mr. Manager ROUNTREE: "Mr. Long, I have found that note. You will find it on page eight. I haven't got the original copy. I think Judge Furches's recollection is about right."

Judge FURCHES: Some short time after that, at a meeting of the Court in conference, it was sometime after I had heard that the writ had been issued, we met in conference and Judge Clark says: "As you gentlemen would not let me file my protest and let me have it spread upon the minutes

and published in the Reports, I would like to have them back." Judge Montgomery pulled his out of his pocket and handed it to him. Judge Douglas told him that he did not have his with him, neither did Judge Faircloth. I was the last one. I said: "Judge Clark, I haven't got mine with me, but owing to what has been said and what may be said, I prefer to keep mine." And that was the end of the matter, as I recollect; he never mentioned it afterwards. I don't think I ever saw his copy of it. He mentioned the fact; asked us whether we got it or not. I know I never carried my copy to the Court; I just read it and put it in my drawer and locked it up. And I have kept it from that time until a day or two ago, when it was handed here to the Court."

Mr. LONG: When a case is heard, as for instance the case of *White v. The Auditor,* and your opinion rendered and the judgment, as in that case, signed by the Chief Justice, what becomes of that case with reference to the docket? A. It goes off the docket and goes out of our Court, and even if it is kept, its appearing upon the docket does not give it a standing in Court, as will be seen in the case at the last term of Court, of *Finlayson v. Kirby.*

Q. How can a hearing of that sort be arrived at in the Supreme Court? A. By petition if the opinion is filed during the term or within the first twenty days of the succeeding term, setting forth the grounds, with the endorsement of two practicing attorneys of our Court that they believe that there is error in the opinion delivered.

Q. When the Court was there on the bench and Colonel Harris came in and had not filed any affidavit upon which to make his motion in the cause, why was it that the Court would not hear him? A. Because there was nothing before the Court to hear. Nobody, though there was a full bench there, said anything to the contrary of what Judge Montgom-

ery and myself said, and, I think, probably that we were the only members of the Court that had addressed Mr. Harris.

Q. When that judgment was finally entered there, because it went off the docket, as far as the Supreme Court was concerned, and you have a rule, I believe, of the Supreme Court that puts the duty upon the Clerk to issue the writs of execution and to carry the judgment into effect? A. Yes; there is a rule that way and there is a rule, my recollection is that it is 47, that the Court will hear no motion unless it is in writing, and then we have the other rule that you speak of.

Q. So, if Colonel Harris had embodied into an affidavit certain facts, as for instance if he had alleged that he had applied to the Clerk to obey that judgment and issue that writ, and had also alleged that the Clerk had refused it, he could then have brought it up before the Court in the regular way to get an order? A. I so understand it, and I say here if the Clerk had refused to do it and he had brought it before the Court in the way that I consider before the Court, and asked my opinion upon it, I should have decided for him that the Clerk should do it; that is, when it was properly before the Court, I should have decided that the Clerk should do it, because I had held that in the opinion, and it was in the dissenting opinion of Justice Clark; it was seconded, and one ground of the objection to the opinion I wrote, was that it had directed a mandamus. And, of course, unless I changed my opinion, and that with the opinion given the term before, if the matter had been brought before me I should have so held again and I have not changed my mind.

Q. For the benefit of the laymen in the Court, we will ask you to explain the difference of the action of Judges in conference and when you are upon the bench. A. Well, I don't know; the Court is open as a Court when we are in conference. We meet there, though, for the purpose of discussing matters that are before the Court. But for the purpose of

discussing and determining matters that are properly before the Court, not matters that are not before the Court.

Q. In regard to the practice of the Court, for instance in the case of *White v. The Auditor,* which was decided on the 22d of May, 1900, when the dissenting opinions were filed and the case went off the docket, is there any rule of the Court that provides for the dissenting opinion in the trial of the case at a subsequent time? A. None that I know of; in fact, I will say, as the Justices will if I asked them, that while there is no printed rule about filing dissenting opinions after the Court adjourns, that there is a rule among the members of the Court that no dissenting opinion shall be filed after the opening of the Court, unless there is permission obtained from the Court to do so. Some of the Justices, I remember, when the opinions are filed, would say: "I don't concur in this, and I want to file a dissenting opinion. I will try to get it in by the next term, and the courtesies of the Court generally say, we will allow you to do it." That is not done by any rule or agreement. I have never myself filed a dissenting opinion, after the regular opinion was filed, but I know that some of the Justices have, in the way that I have mentioned to you.

Q. The dissenting opinions of Justices Clark and Montgomery in the White case were filed at the time your opinion was delivered in that case, or afterwards? A. The case was held up for sometime for the dissenting opinions to be prepared. It was probably held up two or three weeks in order that the dissenting Justices might have time to prepare their dissenting opinions.

Q. So that if any dissenting opinion had been filed in that case at the September Term, 1900, it would have been published in the 127 Reports, and in a case that was not on the docket? A. Yes; my recollection is that the requests were to publish it in that, but my recollection is that the other Report

was out then. I may be mistaken about that; the Reports for the term in which the opinion was filed, I think, had been printed and distributed.

Q. The case was never before the Court for consideration after the opinion was filed at the May Term? A. Never, except in the way that I have mentioned to you. It was in this incidental way—that I was not willing, and the Court was not willing, to consider it in that way, and no member of the Court objected to what was said to Mr. Harris, or made an objection to accept what was said by Judge Montgomery and myself.

Q. Were you interested in any way in the case of *White v. The Auditor?* A. None in the world, except to try to do my duty as a Judge. I don't know Mr. White; never saw him until last week. I want to say, if it is in order for me to say it, owing to what has been said in this case by the gentlemen representing the State, that I never have mentioned this matter to Colonel Kenan, except when he mentioned it to me. I never mentioned it to him, nor he to me in his office. The only time that this has been mentioned was the first time in the hallway; the next time, at my room, when he came there and brought this protest, and the other time, in the conferences. I never mentioned it to him, or suggested anything to him about it. I never mentioned it to him, except when he mentioned it to me, or except when he mentioned it to us in conference. I never mentioned this thing to Mr. Ayer or Mr. Worth in my life. I have nothing to do with their matters; and it has been said here, suggested rather, to know whether they were to obey the writ. If I had heard anything about that, and probably I had, from what Judge Montgomery said, and what I can state, if it is allowed, I will state that I had never mentioned it to them and I was not influenced by that, because it never passed my mind; I never thought but what Mr. Ayer or Mr. Worth would obey a writ

from the Supreme Court of North Carolina. I remember, as they say, that Judge Montgomery said in one of these conferences at the time this was discussed, because it was discussed a good deal; that is, about the time that the writ was issued, and Colonel Kenan was coming in there and it had been talked about, Judge Montgomery said to Judge Clark: "You have been to Mr. Worth and threatened him if he opposed the writ of this Court." Judge Clark says: "I was over there, but he invited me." Montgomery says: "I was going home one afternoon and I passed Governor Russell and Mr. Worth, and they were talking about this thing, and I asked Mr. Worth what he was going to do. He said, 'I am going to obey the writ. Judge Clark has been over to my office and threatened me; I think he threatened impeachment.' I said, 'Suppose they issue a writ of mandamus, what will you do?' Judge Clark said, 'If they issued a writ of mandamus, there will be three vacant seats over there in the court-house.' Judge Clark said, 'He invited me in there and I said that.' Judge Montgomery says, 'Judge Clark, Mr. Worth says that you came there of your own accord, and that you instructed him not to obey the instructions of this Court.' Judge Clark did not deny it, except that Worth invited him there.

Q. At the time the case of *White v. The Auditor,* was here in the Supreme Court, did you know anything about the facts in that case, except such as appeared in the record there before you? A. I did not. When respectable counsel come into court with something that they agree to, I would think it was a reflection upon them if I was to go hunting around and try to find out something wrong that they had done about the matter, some wrong that they had been engaged in. I never have done it, and don't expect to do it. I expect to take records that are brought there by respectable counsel.

Mr. Manager ALLEN: "We will have to ask the Judge to confine himself to the answer."

Mr. LONG: "That is a part of the question."

Mr. C. M. BUSBEE: "The objection is, as to what the witness said he will do in the future."

Judge FURCHES: "I will withdraw it; I don't want to say anything that I am not authorized to say."

Mr. LONG: So the Court, as I understand it, acted upon the facts as presented there in that case agreed? A. Most certainly they did, and there was never a suggestion by counsel or by any member of the Court that it was not correct.

Q. In the decision of that opinion of *White v. Auditor,* or anything connected thereto, were you influenced in any way by personal or political considerations? A. I answer that I was not. I can not conceive that I was. If I was, I was unconscious of it. I do not know Mr. White, and I don't know anything about him.

Q. After what occurred over there in the court room, as you have detailed it, do you know anything about the auditing of the claim of *White v. The Auditor?* A. I do not know anything about it.

Q. Did you ever have any information or knowledge as to any of these warrants and accounts and vouchers which were introduced in evidence here the other day from the office of the Auditor? A. I never saw them, I never heard them repeated, and do not know anything about them. As to how it was filed and what was done about it, I have no knowledge. It was none of my business to know anything about it, I thought.

Q. That opinion was rendered in May, 1900. How long was it after that, that the Supreme Court adjourned and you returned to your home in Statesville? A. I can not tell, Mr. Long. It was towards the end of the session; but I don't remember just when we adjourned. I don't think we ad-

journed until the early part of June, but I don't know what day.

Mr. LONG: "Gentlemen, take the witness."

Mr. POU: Judge Furches, do you remember that the Supreme Court did not adjourn until about the 13th of June? A. I do not; I don't remember when the Legislature met here that last time. I went home before the Legislature met; I know that.

Q. The Supreme Court remained in session longer at that time than ever before? A. Yes; Judge Faircloth and myself went home. Judge Montgomery, Judge Clark and Judge Douglas agreed to stay here and hold the Court open to write up some opinions that had not been agreed upon.

Q. There will be no objection upon the part of the other side to referring to the record of the Supreme Court as to when it adjourned? A. I have no objection to that, but I went home a week before it was adjourned.

Q. Judge Furches, is it not a well-established principle of law that when a judgment for money is rendered, that that matter is pending in court, that that case is pending in court until the judgment is satisfied? A. I don't so understand it.

Q. This case of *White v. The Auditor and Treasurer* was a judgment entered in the Supreme Court? A. Yes.

Q. There are two methods by which the Supreme Court might have finally adjudicated that case; one by sending it back to Perquimans, or entering judgment in the Supreme Court, and the latter course was adopted? A. Yes; the reason of that was that it was stated by counsel that they only wanted the opinion of the Court; that the defendants, if it was against them, were ready to comply with this, and they thought it unnecessary to send it around when the parties themselves only wanted the opinion of the Court.

Q. Now, Judge, which is the more usual of those practices; to send the opinion down and let the judgment be entered in

the Court below? A. In the practice now, it is generally the custom to send them down, though it may be done either way, as I understand it.

Q. So this judgment was entered here and was unsatisfied at the time the application was made by Mr. Harris to the Clerk? A. It was entered here, and I believe it was unsatisfied.

Q. Now, Judge Furches, do I understand you as being of the opinion that the Court directed, or did not direct, Colonel Kenan to issue that mandamus? A. I tried to be explicit. I never understood the Court to direct him to do it. I understood the Court to refuse as a Court to direct him to issue it, for the reason that I have undertaken to give to you, that there was nothing before the Court for the Court to act upon as a Court; but the members of the Court,myself among them, said we had no objection as a member of the Court to advising him to do it.

Q. I think that you stated that Colonel Kenan came to you considerably embarrassed as to what his duties were in the premises; that he saw you once at the Yarboro, once in the hall and once, if not twice, in conference? A. I want to state that when he first mentioned it to me he expressed no doubt about it at all. He just told me that Harris had made a proper application and he was going to issue it. But after Judge Clark had protested against it, I think Colonel Kenan was very much worried about it; he said he wanted to do his duty as a clerk, and I have no doubt that he did.

Q. The last time this was mentioned in the conference of the Court, I ask you if Colonel Kenan did not ask the opinion of each Judge, turning to each member of the Court. A. I think he did, or at least it was given by each member of the Court.

Q. And after it was given by each member, I ask you if

Judge Montgomery did not say, "That settles it?" A. Colonel Kenan said that Judge Montgomery stated that; I don't say that he did not. I don't remember it, but I don't say that he did not.

Q. I am not certain, Judge Furches, that I understood you just now distinctly, and I did not want to interrupt you. The Court was informed that the officers in the building here would not pay that claim without a mandamus, but would pay it with a mandamus? A. I had the information of the discussion that Judge Montgomery had with Judge Clark about it, but I want to say that I was not at all influenced by that, because I never thought that Mr. Worth or Mr. Ayer would refuse to obey a writ of the Court.

Q. Do you remember whether Colonel Harris made that statement to you or in your presence that they would not pay without the writ of mandamus? A. I don't remember that; understood that Colonel Harris said that they would not pay it without a writ.

Q. You stated that Judge Clark said, "If they do that there will be three vacant chairs." Was it not this way. Did not Mr. Worth say, "Suppose the Court issues a mandamus and I refuse to pay it?" Was not that it? A. That may have been the inference. I suppose if he made it that it would not be anything against him. I don't know how that is.

Q. You stated just now, Judge, that it was not the custom, or rather there was a rule about filing a dissenting opinion after the opinion in the case had been filed. Is there any rule against filing a protest against any order that the Court may make? A. None that I know of, because I have never known any such thing as that to be asked until now, and I suppose if there is a matter before the Court, you might call it a protest. The Justice would then have a right to file his opinion or protest. This was put, not upon that ground that

he did not have a right in the case to file a dissenting opinion, but it was put upon the ground before the Court, Judge Clark and all of us, that there was nothing before the Court for the Court to act upon as a Court. That was the grounds.

Q. Admittedly, Judge Clark would have had the right to file some objection to any act of the Court, might he not? A. When there was any case before the Court he could have put it upon record. The Court never made any order in this case.

Q. The Court was in session, in conference, at the time the final advice and direction was given to Colonel Kenan, was it not? A. Yes; but the Court being in session has no more jurisdiction over a matter that is not before them than they have when they are out of session; that is, I desire to be understood, that you or anyone else might come in there and ask the opinion of the members of the Court about a matter that was not before the Court, but they could not make any order. They would give you their views, but they could make no order of the Court upon it.

Q. All the opinions of the Court are rendered when the Judges are sitting upon the bench, are they not? A. Yes.

Q. And so with the judgments? A. Well, I don't remember but three cases where judgments were rendered in the Court since I have been here; that was this case and Wilson's case, and one of the school cases that we have been offering here, *Barnhill v. Thompson.* Judgment was entered here in that case. I did not write any of them, did not sign any of them; in fact, it was a sort of matter that I did not take special note of.

Q. Suppose, Judge Furches, the Clerk had refused to have issued the writ, would the Court have had jurisdiction to have ordered him to do so? A. I think the Court could have done so if it was before the Court.

Q. Mr. Harris had filed a written request upon the Clerk

for the issuing of the execution, had he not? A. I understand so. He had nothing of the kind in that Court before us, and so stated.

Q. I will come to Judge Clark's dissent or protest. When it was first presented, I will ask you if the objection to it was not that it did not state directly the facts as then existed? A. No, sir; that was not the objection; the objection was, as I told you, because there was nothing before the Court, and I stated to Judge Clark further that I objected to it, because his protest did not state, as I thought, truthfully, the transaction; that is, it did not state there was nothing before the Court; it did not state that the Court turned Mr. Harris off because there was nothing before the Court, and he did not state that the judgment had been affirmed in the opinion that was made before.

Q. Do you remember the cause of the striking out of a portion of that opinion or protest? Was not that made to conform to the facts as they then existed? A. I can not tell you why they were stricken out, nor when they were stricken out. I did not know they were stricken out until I saw a publication of Judge Clark's testimony before the Judiciary Committee. I never saw the testimony; I never saw the paper since it was changed until it was offered here the other day; I never knew that there had ever been any erasures or changes in it until I saw what was in evidence before the Judiciary Committee. I knew at once that that was not the protest or opinion that he filed. I had mine and I went and looked at it to see the changes; in fact, I don't recall that I ever saw Judge Clark's copy of it, or anybody's copy of it, except the passing of Judge Montgomery's to him.

Q. These copies were sent around or delivered some time before the Tuesday when the final advice was given, and your copy was in your room, was it not? And Judge Clark brought this up in conference and asked what about his pro-

test, whether it was allowed or considered? A. Wait a minute; you put too much in your question. You say when we advise; you use that?

Q. Yes; I use that rather than direct, because I thought that was better. A. It was only our opinion about it. That was all that I wanted, to give the Senators to understand that we were giving nothing but our opinion as to his duty. About the paper, I don't think Judge Clark exhibited his paper; he simply asked us if we received it, and it itself stated what it was. It was to be filed, spread upon the minutes and the other part published in the Reports and that called out what was said, and not what he said about it, the paper itself stating what he asked to be done. I told him that there was nothing before the Court for him to dissent from, nothing before the Court for him to file any protest to put upon the minutes, and that we objected to it.

Q. Do you not remember, Judge Furches, that Judge Clark undertook to change this opinion on the table? A. I don't remember it.

Q. You do remember that Judge Montgomery stated to him that he had been filing political opinions, and that it was time to stop. A. Something to that effect.

Q. And thereupon he was refused permission to file? A. He was refused permission before that. Judge Montgomery objected to his doing it, and probably said more than any other member of the Court.

Q. Do you remember an instance since you have been on the bench when any member of the Court was denied the privilege of spreading anything upon the records which he desired to spread before it? A. I can't think of any, because I can't think of any case where he has asked it. If you will mention any case—

Q. I have not any case? A. I would like to know your ground. While we have a Chief Justice and Associate Jus-

tices in our conferences, we all have equal powers and equal voice, and we all express ourselves.

Q. But our contention is, Judge, that that was an act of the Court; that is where we differ.

Mr. POU: It is just the difference in the way we look at it. Our side looks at it as a view of the Court; your view is that it was the personal advice of the members. A. What was said at the time, if that is to control, was nothing only our advice, because we expressly told the Clerk so.

The PRESIDENT: "The Sergeant-at-Arms will adjourn the Court until to-morrow at 10 o'clock."

The Sergeant-at-Arms makes due proclamation and the Court adjourns until 10 o'clock a. m., Tuesday, March 19, 1901.

NINTH DAY.

THE SENATE CHAMBER,

Tuesday, March 19, 1901.

Court met pursuant to adjournment at 10 o'clock a. m., and was called to order by the President.

The Sergeant-at-Arms makes due announcement of the convening of the Court.

The roll is called and the following Senators answer to their names:

Senators Arrington, Alexander, Aycock, Bray, Broughton, Brown, Burroughs, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard. Fifty.

On motion of Mr. Arrington, the reading of the Minutes of yesterday is dispensed with.

The PRESIDENT: "The Court is ready to proceed to business."

Justice FURCHES is recalled and examined in behalf of the respondents.

Examination.

By Mr. POU:

Q. In the answer as filed by yourself and Judge Douglas referring to the refusal of Judges to permit Judge Clark to file his dissent or protest, the answer, I think, uses this language: "There was objection, and Judge Clark withdrew the paper;" is that correct, or was there a refusal to permit him to file it? A. I do not remember what is stated

in the answer, although the answer was read to me, and I signed it. My recollection about the matter is, as I stated to you yesterday, that when we met, Judge Clark asked the question of the Court, if they had received his paper. I think his language was, "I suppose you received it." The response was, that we had; and in the paper it stated what was wanted to be done. The protest, as I understood he called it, he asked to be spread upon the minutes of the Court, and to the balance, which he called an opinion, to be published in the 127 N. C. Report, which I believe is not out yet. I then stated to Judge Clark, as well as I can recollect, that there was nothing before the Court to file an opinion upon, and that so far as I was concerned, as an individual member of the Court, I should object to its being put upon record, and to its being published in the Reports.

Q. Then there was a refusal? A. Yes, what I have stated was a refusal. The other members of the Court concurred in that.

Q. Judge Clark never withdrew the paper or his request that it be filed? A. I think not; I do not remember much more was said until after the writ had been issued, and the money paid, as I understood, but then at one of our meetings he said "that as you will not allow me to put my protest on the minutes, or have it published in the Reports, I would like to have it back." Then occurred what I stated. Judge Montgomery handed his to Judge Clark; Judge Douglas and Judge Faircloth said that they did not have theirs with them, and I said I did not have mine with me, but that owing to what had been said, I preferred to keep mine. That is the last I heard of the protest or of the opinion of Judge Clark in conference or elsewhere.

Q. I ask you about the conversation Judge Montgomery reported he had had with Treasurer Worth and Governor Russell; I ask you if he did not state that Treasurer Worth

said he would pay the money if the mandamus was issued? A. I do not remember that he did, but he may have done so. I do not say he did not. I am only stating these things as I remember them. That conversation, I think, was not long after the opinion was filed on the 22d of May; not long after that. My recollection is that that was when that matter was spoken of.

Q. Now, we come to the time when the advice was given, whatever we may call it, to Colonel Kenan, to issue the mandamus. I ask you if during the conference when it was considered whether this advice should be given or not, if Judge Montgomery did not say upon this point: "I am compelled to tell Colonel Kenan that he has not the constitutional power to issue this writ. The others of you have political parties behind you, but I have nothing, and I am bound to stand by the letter of the Constitution." I do not remember the language.

Q. Anything of the kind? A. I do not recollect that he did.

Q. Now, since the filing of the opinion in *White v. Auditor,* on May 22, 1900, has the Supreme Court issued any order in that case? A. The Supreme Court has issued no order in the case, because the majority of the Court was of the opinion that there was nothing before the Court for it to make an order upon, and what was said was said to Colonel Kenan, as I understand it, and gave simply the opinion of the Court, speaking as individual members of the Court to Colonel Kenan, who seemed to be disturbed about it, and while there was no order made about it, it was said to Colonel Kenan that the opinion of the Court and the judgment itself directed the issuance of the writ. I do not wish to be understood, from what I say, or to create the impression, that Colonel Kenan did anything wrong about the matter, or had not reason to believe that Judges Faircloth, Douglas and myself thought it was his duty to issue it.

Q. As a Court, was any order issued? A. No.

Q. As a Court, was any advice given? A. Not as a Court.

Q. Personally, did you give any advice to Colonel Kenan to issue the writ at a time when he was hesitating? A. I gave him my opinion; not advice. I gave him my opinion that he should issue it, because the opinion and judgment directed it.

Q. And Judge Douglas gave a similar opinion? A. Yes, and Judge Faircloth.

Q. Did Judge Clark, at any time in the discussion of his dissenting opinion, offer to strike out such parts of it as were objectionable to the majority of the Court? I mean the one he offered to file, which was refused? A. I am not sure but that he did say that if any part of it was objectionable, to let him know, and he would strike it out, or correct it. I said Judge Clark, it is all objectionable to me.

Q. Did he make any corrections? A. None at all then. They seem to have been made since.

Q. I ask you if Judge Clark did not offer to strike out that part of the opinion which was made inapplicable because of the writ having been issued? A. He did not offer to strike out any particular part, but I think he stated in substance, what I have stated to you, and my recollection is as I stated yesterday. I may be mistaken. He did not even have the paper at that time. I do not think he had it.

Q. Your recollection is he did not offer to strike out the part that stated the Clerk had issued it of his own motion? A. No, sir; nothing of the kind, that I remember. I am well satisfied he did not.

Q. Now, we will leave that part, and come to the office-holding cases. Has there ever been an opinion rendered by the Supreme Court prior to the Day case, in which the doc-

trine of *Hoke v. Henderson* was applied to an offive having duties distinct from the old office? A. I think the case of *State v. Bellamy* did. It had a different organization, different officers, and somewhat different additions to duties; that is my recollection about it. But I have not read it with a view of answering the question.

Q. In that case, I ask you if the Supreme Court did not make an analysis, and find that the actual and only change was in the name of the office? A. It may have done that in the argument, but under the act of the Legislature it was bound; according to my recollection there were other things involved—changing the name, changing the corporation, changing the names of the superintendets and their assistants. My recollection is, that it added other duties to those in the old act; that is my recollection. I may be mistaken.

Q. We can decide that by referring to the act and to the opinion? A. Yes; more correctly than I can give it to you, without comparing the act and the opinion.

Q. From *Hoke v. Henderson* and *Wood v. Bellamy,* did the Supreme Court ever apply that doctrine to any case where the Legislature had pretended to change the duties of the office? A. They applied it to a case where there had been an abolition of the office.

Q. The language in *Hoke v. Henderson* is that this doctrine applies when an office is transferred from one to another in identical shape, and with the same duties? A. Substantially, I think the opinion in *Hoke v. Henderson* well settled that question. I have read it, but can not remember the language.

Q. I read you the language of the opinion in *Wood v. Bellamy*: "We have examined the act of 1897 carefully, and there is not one single duty required of the new Board of Trustees that was not required of the old Board of Directors; there was nothing in the act, but the same old offices with

changed names, with the same duties, rights and privileges as were provided in the old law;" that is from the opinion? A. Yes, sir.

Q. In *Wood v. Bellamy* the old act was attempted to be amended or repealed, and this new system created under the same act? A. Yes, abolished, and another set up in the same act.

Q. And the act began by stating that the old act was amended as follows:? A. I do not remember; the act will show.

Q. Do you remember before two years ago, whether an office within the power of the Legislature, a legislative office, was abolished in so many words, or was stated to have been abolished by an act of the Legislature, that the act abolishing it had ever been annulled? A. It had been declared to be unconstitutional in the case of *Cotten v. Ellis;* it is my recollection that it was so held.

Q. Is that not distinctly put upon the ground that the office of Adjutant-General was one created by act of Congress, and that the Legislature could not abolish it? A. That is stated; but that is not your question. I understood you to ask me if I could call to mind any case where an office had been abolished.

Q. I said an office under the control of the Legislature—a legislative office? A. Yes. I will mention another, which will cover it. That is the case of *Bailey v. Caldwell.*

Q. That was decided upon the same ground, that the office Bailey held, being created by the Constitutional Conventoin, it could not be abolished by the Legislature? A. The opinion will show; but I think in the opinion and discussion and judgment, it is not put on that ground. My opinion is, that legislation by a convention may be changed as that by a Legislature.

Q. That was an action brought against Governor Cald-

well, but the case states that the Court may take jurisdiction of the case? A. Probably it did.

Q. The Legislature of 1899 passed an act purporting to abolish the Western Criminal District? A. Yes.

Q. Some days thereafter it passed another act re-establishing the district in the west, and making it very much larger, but with similar jurisdiction; there were then three acts, one of the Legislature of 1895, changing the Buncombe Criminal Court into a district; the act of 1897, adding the county of McDowell to the district, making five counties, and the act of February, 1899, repealing the whole system and then the act of March, 1899, establishing a district different from any that had theretofore existed, taking in the county of Forsyth, and I believe, Surry. I ask you if the Supreme Court has not construed all these acts together, and annulled the act of February, 1899, abolishing the system? A. The opinion will show what the Court did. They construed them all together, and considered them all together as amendments. They held that they established the same court they sought to abolish, and held that the act did not abolish it. I refer to the opinion.

Q. State what effect the Court has given to the act of February, 1899, the one abolishing the Western Criminal District? A. I would like to answer you, if I could comprehend you.

Q. I mean, here were three acts: first, the Buncombe County District, the Act of 1895, putting other counties in; the Act of 1897, adding McDowell to them; there we have a district of five counties, with a Judge, Solicitor, etc. The Act of 1899, in plain and distinct words, abolished that system, and transferred everything to the Superior Court. Now, what effect has been given to the act of 1899? A. That will more correctly appear from the decisions of this Court, but as I understand it, the effect of it was to declare that the court

was not abolished as a Criminal Court in the county of Buncombe, and in the other counties where it was established before, so far as to affect the vested right or the constitutional right of the officers holding the court, and no further; but that it did not have the effect to take away their constitutional rights. That is all, I think, the three or four opinions of the Court will amount to; that in the four new counties, there being no vested rights, the Legislature had the right to establish the Criminal Courts, and there being no vested right in the officer of McDowell County, it was held he had no right to interfere.

Q. I ask you if the Court did not consider the case as if the repealing act had not been passed? A. Yes.

Q. Although there was a week or ten days when there was no Criminal Court? A. I do not remember about that.

Q. There is no question about the power of the Legislature to abolish any Criminal Court it has set up, is there? A. I think it can abolish any court it sets up, if it abolishes the Court.

Q. That Western Criminal Circuit was a creature of the Legislature, was it not? A. Yes; but if it has abolished it and stopped, that would have been the end; but it set up in almost the same language, another court in the same jurisdiction, with the same powers, and referred in the act to the act they had abolished, for the law involved in the case.

Q. The effect of that decision was to hold that the Legislature could not abolish a court or an office, and at the same session establish any similar office, so as to oust the officers of the first court? A. .....

Q. The effect was to hold that the Legislature could not abolish a court or an office, and at the same session establish any similar office, so as to oust the officers of the first court? A. The effect was that the Legislature did not, by those acts, abolish the office in such a way as to take away the rights of

officers that had been admitted to have been regularly elected and inducted, and that they had a vested right, under *Hoke v. Henderson.*

Q. Under your construction of *Hoke v. Henderson,* and of the Constitution, is there any way by which the Legislature can abolish a Legislative office, and at the same session of the Legislature provide that some other person shall perform the duties of that Legislative office theretofore performed by the previous incumbent? A. I am not prepared to answer a question of the kind, as to what the Legislature can do.

Q. Another effect of the decision was to give to a statutory Solicitor a higher plane of office than is given the Solicitor under the Constitution? A. I do not so understand it.

Q. Take the case of McCall, who was Solicitor of the four counties composing the district formed by the Act of 1895; in 1897, the duties of the Solicitor of McDowell County were transferred to McCall. They were taken from some other Solicitor, were they not? A. I do not think there was any Criminal Court established at that time.

Q. But the Superior had that jurisdiction? A. Yes.

Q. And the Solicitor for that Judicial District had the fees and emoluments incident to the prosecution of the criminal docket in McDowell? A. Yes; in the Superior Court.

Q. And that was transferred by the Act of 1897, to McCall? A. On the establishment of the court, it went to him.

Q. It was taken from the constitutional Solicitor, and transferred to him? A. He got it under the act. I do not say it was taken from him. I want my answers to go down, because, as I said, otherwise it might not appear from your question what my answer was. I understand that Mr. McDowell got the appointment. I understand, and it was so decided in the case of *Mott v. Griffith,* from Forsyth County, where Mott claimed that he had a right to the office in the

Criminal Court, which case we decided. I wrote the unanimous opinion of the Court, which decided that he did not have it, and I think the decision was put upon the doctrine of *Bunting v. Gales.*

Q. If McCall received the perquisites incident to the docket in McDowell County, who lost them? A. He had no right to them until the next court. He was put in by the Legislature.

Q. Part of his duties were to prosecute in McDowell County? A. I was going to say, that, while it was a constitutional right, as I understand it, of a Solicitor elected by the people to prosecute during his term in the Superior Court, that he has no fees or anything of that sort until they come into his court, and he gains them, and when an inferior court was set up, cases in that court did not go into the Superior Court, and we held in *Mott v. Griffith* that he was not entitled to them.

Q. Can you draw any distinction between a fee which would come into the Superior Court, and enure to the Solicitor, and a fee that would come into the Clerk's office? A. We decided in *White v. Murray,* who was the Clerk of the Superior Court, and claimed Justice Mott did in the case of *Mott v. Griffith,* that White was not entitled to it, from the fact he was Clerk of the Superior Court, and that was put upon the same doctrine as *Bunting v. Gales.*

Q. One of the effects of this decision was that the Legislature could add a county to a district, but could not take one away; was it not? A. It was held they could do that; there was no question that I know of, of taking any county out. I suppose they could; it is done in regard to Superior Courts.

Q. The decision of the Court was, that the Legislature of 1897, having added to the Buncombe Criminal District, and McCall, having prosecuted two years, a Legislature could

not take it away from McCall? A. I do not understand the decision to mean that. I understand that, having a vested right in the office, they could not transfer it.

Q. They could not set up another court of their own? A. They could set up another court, and could have another Solicitor, but he would have no right but in the court he was in.

Q. I ask you, if the decision did not decide it was the same district, but instead of having five counties, it had nine? A. That was a fact; it increased the extent of the district. Each county had the same jurisdiction that the county of Buncombe and others, originally had; it was only an extension of the district.

Q. Your opinion held it was a district, and not separate County Courts? A. We held they were independent County Courts, with jurisdiction in the county, but that there was one presiding officer, who was to hold the courts of those counties, and we called it a District or Circuit.

Q. And the effect of that decision was to give that district five or six Solicitors? A. Five or six.

Q. The intention of the Legislature was to have a Solicitor from each county? A. .....

Q. That was the avowed intent of the Legislature, and the decision of the Court was that McCall had a vested right in five counties? A. The decision of the Court was, that he had a vested right in those counties in which he had been elected, and had been inducted into office, and where his term had not expired, until the expiration of his term.

Q. And also that he had a vested right in the county attached? A. Yes; it was upon the ground that they had not provided any Solicitor for the county when it was put in the district, and that he had assumed the duties and held the office for two years, and it is put upon the analogy that where there is a change in the Superior Court districts, and the

cases go from one county to the other, the Solicitor of the district to which the county is added takes charge of the case, as if originally instituted in that district. That was the ground it was put upon, whether right or not.

Q. Advert to the Corporation Commission case. That was established by the Act of 1891. The Act of 1899, provided upon its face for the abolition and appeal of the Railroad Commission system, did it not? A. I think so; I can not recollect all the provisions of the statute; I think, though, that it did that, and the next day, or the day after it, established and adopted almost the exact language of the Railroad Commission Act, and re-enacted it.

Q. It re-enacted a system which included all of the duties of the Railroad Commission, and also, other important duties? A. I think there were some other duties. We were very careful about the matter. We compared the two acts, the one said to be repealed and the one re-enacted, and found they were almost identical. A large part of it was a copy of the original act.

Q. And you decided that the Legislature intended to re-establish the same thing? A. We decided that they re-enacted it, and did not abolish the office.

Q. I ask you if the acts were not dissimilar in many important parts; if they did not change the name of the office? A. Yes.

Q. If they did not change the salary of the office? A. I do not remember; that is often done, and it would make no difference. The salary of Judge Stevens was changed from $1,800 to $2,700, and did not destroy his right to the office.

Q. The Legislature of 1895 passed an act stating that at the end of the term of Maj. J. W. Wilson, the salary should be reduced to $1,500; that term expired in April, 1899? A. I do not remember. The act will show.

Q. The manner of electing officers was changed from electing them by the General Assembly to electing them by the people? A. That was also the case in *Cherry v. Burns.* He had been elected by the Governor and his Board, and it was changed, as I said yesterday, I think, to the Senate, and they elected Mr. Cherry, and we held the election good, and that they had a right to make the change.

Q. It is not important, but was not the point in *Cherry v. Burns,* whether the Senate and House should meet in joint session? A. That may be so. I know that was one of the questions; you may be correct about it; I know that was one of the points, that it was a constitutional office, and that they could not change the mode of election.

Q. In addition, was not their jurisdiction and powers were extended; the Corporation Commission was given supervision of banks, building and loan associations, saving banks and institutions of that character? A. I think so, but we considered that did not abolish the office; that the duties of public officers were increased, did not change the office; clerks have other duties devolved upon them than those when they were elected, and also sheriffs, and it has been held that their bonds were liable for the additional duty devolving upon them.

Q. But they were duties in the same line as the duties theretofore performed? A. I can not say that they were the same, or they would not have been added.

Q. If a sheriff has been made tax collector, and the county has a small stock law or road district, it is competent to say he shall be tax collector of that tax, and that his bond is liable, but the supervision of banks was a duty theretofore performed by the Treasurer, and had never been performed by the Railroad Commission, and I see no connection between banks and railroads? A. I do not know. You speak of these duties having been performed by the Treasurer; I do not know anything about that.

Q. What was the difference between the duties required of the Corporation Commissioners and the Railroad Commissioners. A. I think some duties were added.

Q. And a different oath was required? A. I do not remember any difference in the oath; I suppose it was to perform their duty.

Q. It was to perform the duties of Corporation Commissioner; the other was as a Railroad Commissioner? A. Yes.

Q. I ask you, if the effect was not to confer upon Dr. Abbott duties he had not theretofore performed, and required of other officers, who had taken the oath to perform them, without requiring it from him? A. Of course, if other duties were added, he would, as one of the Commissioners, have to exercise them if he discharged his duty; but the way we considered it, we held there had been no attempt to abolish the office; the changing the name, and the other duties added to the office, would not abolish it, and that it was his duty to perform them.

Q. The effect of the decision of the Court was that the Legislature had not attempted or intended to abolish the office of Railroad Commissioners? A. We held they had not done it.

Q. They had a right to do it, under the Constitution? A. Yes, if they had abolished the office, and not set it up again right away. I want to say, that while these matters were discussed, the principal ground taken in the case was, that there was a day intervening between the time one office went out and the other came in.

Q. In *Wilson v. Jordon,* I think the records showed that the Railroad Commission was abolished and the Corporation Commission established the same day? A. I think there was a day intervening, but of course I would be glad to be refreshed, because there is so much of this I can not remember it all. But my recollection is, as I stated, that the prin-

cipal ground of the argument in the case, was, that there was a day intervening between the time one was abolished and the other established—called a hiatus—and we thought that did not invalidate the act. At the same term, a week or two afterwards, the case came before us of *State v. Southern Railway,* from Burke. That arose out of the same act, as a criminal offence, and it was held, by the unanimous Court, in that case, that the hiatus did not interfere with the case.

Q. If the first decision was incorrect, the second one affirming it, did not strengthen it, of course? A. The opinion was, by unanimous Court. *Abbott v. Beddingfield* was cited, and other authority, and the opinion was given by one of the dissenting Judges.

Q. The effect of *Abbott v. Beddingfield* was to clothe the old office of Dr. Abbott with new duties? A. I think not.

Q. Dr. Abbott had not performed any of those duties before the Court rendered its judgment? A. Of course not, until the act was passed, and he could not do it until he was acting as Commissioner.

Q. And then the Court adjudged that he should be inducted into an office containing these new duties? A. I understand it was held he was in office, and had been in it before, and was entitled to hold it.

Q. Do you not remember that the judgment was entered in the Superior Court, and that the enforcement of the judgment was ordered from the Supreme Court in that case? A. I do not remember; it probably was. My recollection is that the Court undertook to enforce its judgment, and did not sent it back to the Superior Court.

Q. That judgment was rendered in the fall of 1899; I ask you if, in the spring of 1899, in the Day case, the Supreme Court did not decide that Day could not perform the new duties; that is, that they held that the executive board had some duties that Captain Day could not perform—the

duty of buying land for the penitentiary; and I ask you if you did not hold the act unconstitutional, and that Mr. Day was entitled to hold his office, but was not entitled to perform the new duties? A. I think so, and it was because there was another Borad constituted to do that, and that they could do that, where it did not interfere with Captain Day's rights, but in this case there was nobody else given these new duties; they devolved upon the Board itself; that was the distinction we understood between the cases.

Q. Would not the logical effect of your decision have been, if you had sustained the Day case, and other cases, that the Corporation Commission had a dual existence, first, the Railroad Commissioners, when Dr. Abbot would have been a member, with a salary of $1,500; second, as a Corporation Commission, when it exercised the new duties, and when Mr. Beddingfield would have been a member with a salary of $2,000. A. I think not, because they had to act as a Board, and that action had to be joint, and not distinct and separate, as in Day's case—another Board set up with duties to perform that did not take away Day's duties, but here was a Board with the duty to act together to constitute a court and declared to be a court and the same court, as I understood it, a part of them could not have one jurisdiction, and another part an increased or extended jurisdiction; that they must all have the same rights and the same jurisdiction as to the matters before them.

Q. A similar principle was announced by the Court in the oyster case. Mr. White had charge of the oyster industry; when there were no duties except the protection of oysters in the eastern waters? A. I do not remember the act.

Q. He was elected to office by the Legislature of 1897, and given charge of the protection and promotion of the oyster industry; I ask you if that act was not repealed, and the office abolished, or purported to be, in terms, by the Act of 1899? A. I think so.

Q. Thereafter, the General Assembly created a new institution in the east—a Board of Shell-Fish Commissioners—whose duty it was not only to protect the oysters but all shell fish? A. Yes; the duties were increased.

Q. There was a different salary, a different tenure of office? Different duties, a different manner of appointment, and the Supreme Court held that it was the same office? A. They held, as I understand, and I think the opinion is to that effect, that under the doctrine of *Hoke v. Henderson, Wood v. Bellamy, Abbott v. Beddingfield,* and other cases, decided on that ground, that they could not take White's office from him until his term of office expired, and it was construed that the office was continued, it was necessary to have a head, and the Legislature could not take it away from him, and transfer it to one or more persons, as was sought to be done in Day's case, and that he was entitled to the office, and being an officer, it was his duty to administer the office under the legislation as amended. We treated and considered it in every opinion, as amendatory of the other acts we have been going over here; that where the Legislature increases the duties of the officer, it is his duty to exercise the new duties as well as the old.

Q. The decision of *Hoke v. Henderson* held that a public officer had a property in the emoluments of his office? A. Yes; and in the office.

Q. For the sake of the emoluments? A. I think not; the opinion will show.

Q. I ask you, if, in the case of *Day v. State's Prison,* it was not enunciated that an officer had a property in the duties of his office; did the Court ever hold that before? A. I do not remember the language of the opinion. If it is there, it will speak for itself.

Q. The vital point in the Day case was, that the duties constituted the office, was it not? A. I do not remember the

language in the discussion of the case. The opinion was written by Justice Montgomery. My understanding is that from the fact that Day was in, and had tenure of office, he could not be removed by the Legislature.

Q. If that was good law, does it not follow that Judge Jones, in the Western District, in 1895, made an absurd defense when he did not claim the duties of the office, and claimed that office to which Judge Ewart had been appointed? A. That may be so; no such question was presented, argued or considered. It may be possible that his attorneys slipped. My recollection of the case is, I may be incorrect, as I have stated, that Judge Ewart was elected by the Legislature, and that the Governor refused to give him a commission, and after refusing, appointed Judge Jones as Judge of the Criminal District.

Q. Judge Jones was in office before, and the Governor considered the district abolished, and reappointed him? A. I do not know about that; he claimed under a commission and appointment from the Governor.

Q. And he made a great mistake? A. I do not pass upon that.

Q. It looks as if he had a perfect defense if the point had been presented, does it not? A. I do not know about that.

Q. About the case of *Cook v. Meares;* Judge Meares was in; he had been Judge of the District composed of the counties of Mecklenburg and New Hanover, and Mr. Cook was elected before the new district was created, and Judge Meares never thought to make the defense that it was the same office? A. He would seem to be in the position of Judge Jones; the Governor appointed Judge Meares, and he depended upon that ground, but the case was not decided upon his right to the office; it was decided upon the right of Judge Cook—that he had not made up his case, and that it devolved upon him to do so, and that if he was not entitled

to it, he had no interets in saying whether Mr. Meares, or any one else, should keep the office, and it was held in that case that the defect in Judge Cook's election, was, that the act was passed on the 8th, he was elected on the 12th, probably, but the act was not ratified until the 13th or 14th, and that it stated in its terms, that it was to be enforced from and after its ratification. And upon that point, authority was cited which was directly in point, and we held that Judge Cook was elected before the office was established, and that he was not entitled to it, and had no interest in same, or who should hold it.

Q. In the answers, this doctrine of *Hoke v. Henderson* is modified, and is stated to have been the undoubted law of this State for more than sixty years, adhered to by all the Chief Justices of the Court; if that doctrine goes as far as the present Supreme Court says it went, two Judges lost their offices by not knowing anything about the doctrine, did they not? A. Neither the case of *Cooke v. Meares,* or the Jones case, as the case was before us, involved, in the slightest degree, the doctrine of *Hoke v. Henderson.*

Q. But if the men were in office before the Legislature enlarged their districts they were protected by *Hoke v. Henderson* until the expiration of their terms, were they not? A. It may have been, if they had claimed it. I remember after the decision of *Hoke v. Henderson,* that a case came up from Surry County; a Mr. Williams was holding the office of County Court Clerk; a Mr. Summers was elected under the Act of 1832. Mr. Williams came into court and surrendered his office and the books, and Mr. Summers took charge of the office. After the decision in *Hoke v. Henderson,* Mr. Williams concluded he was entitled to his office, and thought he had made a slip, like you think Judges Ewart and Jones did. I am not passing upon that. But after the decision, he thought he had the same rights that Henderson

had, and he brought suit to be reinstated. The Court said that of course the doctrine of *Hoke v. Henderson* would have applied to you if you had, like Henderson, held on, but after you went in and surrendered your office, and accounted, and Summers went in, you abandoned what rights you had, and they decided in favor of Summers.

Re-Direct Examination.

By Mr. Long:

Q. Since you have been upon the bench, have you ever, in any case, written any opinion, or concurred in any opinion of the Court, which you knew, or thought, was contrary to law, as you understood the law? A. I have not. I think I answered that yesterday, but I have no objection to answering it again.

Q. In regard to the discussion between yourself and your associates, including Justice Clark, in regard to the protest referred to, did you ever intend any discourtesy to any of your associates, or to deprive them of any legal right, or to violate the rules and established precedents of the Court? A. I certainly never intended any discourtesy. I never intended to deprive them of any rights, as I understood the law, and I want to say right here, that I have, on yesterday, given a narrative of what transpired in the offering of this protest, and what the members of the Court said. I did that because it was necessarily in the narrative from the questions asked, and without any intention or desire. I do not want to be understood that I did it with a view of reflecting upon any member of the Court, or in impugning his motive, but because I think it was involved in the question, and for the reason I did not want to shirk, or appear to shirk, any responsibility that might attach to the matter.

Q. Did the Court ever, in any of these office-holding cases, hold any act of the Legislature void, except when the act appeared to interfere with, or take away, vested rights of

officers? A. I remember none. I do not think there are any. It is all upon the idea and doctrine that runs through the cases, and it was construed by us in that way, as we thought we were authorized to do by the precedents in this State. In the argument of this case before the Board, it was said that the United States Court, and most of the other courts, held differently, but we considered that whatever they might hold, there was a uniformly fixed rule in this State, to which we adhere, and will continue so to do.

Q. When any Act of the Legislature came before you, and it appeared to divest or devest the right of an officer in his term of office, state whether the Court undertook to abrogate the statute, except in so far as it came in conflict with the constitutional right of the officers?

Mr. Manager ALLEN: "We desire to enter an objection to this examination, on the ground that all the questions asked on the re-examination were put twice on yesterday, and answered by the witness; we do not understand that, upon re-examination, they have the right to go over the examination in chief, and repeat it. It was repeated twice yesterday."

Mr. LONG: "I may be mistaken, but if my friend can refer me to any question of yesterday that includes the question I now ask, I will withdraw it."

Mr. Manager ALLEN: "I have not in my hands a copy of the evidence of yesterday, but I remember Judge Furches saying that in these office holding cases they simply held statutes void in so far as they affected terms of office, and that the Court held other parts of this statute valid."

The PRESIDENT: "I hold it is a repetition."

Senator HENDERSON: "Before the Chief Justice leaves the stand, I would like to be permitted to ask a few questions."

The PRESIDENT: I am requested to ask the following questions by Colonel Henderson:

1. Why was it necessary to issue a writ of mandamus against the Treasurer before the amount had been determined by the Supreme Court, or by the Auditor. A. My understanding was that the amount of the salary due the plaintiff was determined by the opinion of the Court; that that was a question that was before the Court, and that was determined. The other matter in regard to mileage, etc., was simply a regulation or provision of the statute.

2. Q. How could the Clerk of the Supreme Court know what the Auditor would do, or had done, in regard to determining the amount of the claim? A. I do not know. I did not suppose he did know; that was a matter left with the Auditor. He was only to proceed to audit.

3. Q. How could the Supreme Court know that the Auditor would determine with accuracy the amount of the claim? A. The Supreme Court could not know that, and did not know it, but he was one of the officers of the State, and that was for him to do, and not for us to supervise or know anything about, so far as I understood it.

4. Q. Why did not the Supreme Court order a reference, to ascertain the true amount of the claim before ordering or permitting the mandamus to issue against the Auditor and Treasurer? A. Because that was the very matter in controversy, and had been determined by the Court, and there was no occasion for a reference. The facts had been agreed upon, and the Court had, from those facts, determined what the plaintiff was entitled to, that is the annual amount, and there was no suggestion by counsel, no suggestion in the discussions before the Court, that there should be any reference to the Clerk or anyone else.

5. Q. Ought not the Court to have required the Auditor to report to the Court the amount of the claim allowed by him before permitting the mandamus to issue against the Treasurer? A. If it ought, we have mistaken the law. We

did not think so. We thought the Treasurer was to pay on the Auditor's warrant, and not upon what he thought he was entitled to. We only decided the legal question, and then it was a matter for the Auditor and Treasurer.

6. Q. Does the Chief Justice think that it is the duty of the Clerk of the Supreme Court, in all cases, whether the amount in demand is determined or not, to issue a mandamus against the Auditor or Treasurer? A. I can not say in all cases where the amount was not determined. I think it was determined in this case. That was the matter in controversy, to be decided upon by the Court, and we supposed the Auditor and Treasurer would take our adjudication of the matter as a guide, in making a decision, so far as the salary is concerned, leaving the time for which he was entitled to it to be determined upon such proofs as might be brought before them.

7. Q. How many writs of mandamus have been issued by the Supreme Court since you have been on the bench? A. I do not remember.

Q. 8. Does the record of the Supreme Court show that the judgment in this case has been satisfied? A. I do not know how it is. I have never examined or inquired. It was not a matter I thought I had anything to do with.

Question presented to be asked, by Senator WOODARD:

Q. If the Supreme Court did not direct the Clerk to issue the peremptory mandamus, what complaint, if any, was made by the Court when it was ascertained that the writ had been issued? A. None was made by me. And you have it in evidence that there was none made by any Judge except Justice Clark. I did not complain of it, because I thought it was his duty to do it, and I so told him.

The PRESIDENT: "That will do, Judge. Counsel will call the next witness."

Major W. M. ROBBINS, *a witness called in behalf of the respondents, being duly sworn, testifies as follows:*

Examination.

By Mr. OSBORNE:

Q. Do you know the Hon. David M. Furches? A. Yes, I know him.

Q. How long have you known him? A. For thirty-five years.

Q. Where does he live? A. In the same town I do—in Statesville, Iredell County, North Carolina. I have lived there near him for twenty-seven or twenty-eight years.

Q. How near to him? A. Two or three squares—close by.

Q. Do you think you know his general character? A. Yes; I think I do. I have been intimate with him all these years as a neighbor.

Q. And you have seen him in the practice of his profession? A. Yes. I have been with him, and also against him, in many cases.

Q. What is his general character? A. As good as anybody's in North Carolina, for truth, honesty and integrity. I have always differed with him in politics.

Cross-Examination.

By Mr. WATSON:

Q. He has frequently been a candidate for political office, has he not? A. He was a candidate against me way back yonder.

Q. And afterwards he was a candidate against Armfield? A. I think so.

Q. And he was a candidate for other political offices? A. I think so, I am not sure.

Q. Shortly before his election to the bench he was a Republican candidate for Governor? A. I have not kept

posted about his political aspirations. He has lived in a Democratic county, and there was no chance for him.

Q. Was he not at one time Republican candidate for Governor? A. I have forgotton it; it may be so; he did not get the office, I remember that.

Q. He was something of a politician? A. When a private citizen, he was a sincere and earnest Republican, and has been all the years I have known him. He has lived in a county where the politics were against him. I do not think he has done anything improper as a politician. Like the rest of us, he believes in his side.

Q. Was he bitter in his politics? A. No more than you or I. That is my opinion.

Q. He was never insulting to an adversary? A. I never knew him to be; after canvassing with him for sixty days, our relations were pleasant all the time. I loved him as a man, but hated him as a politician.

J. B. HOLMAN, *a witness called in behalf of the respondents, being duly sworn, testifies as follows:*

Examination.

By Mr. LONG:

Q. Where do you reside? A. In Iredell County.

Q. State if you have held any official position, and if so, what? A. I have represented my people in the Legislature several times.

Q. Do you know Chief Justice Furches? A. I do.

Q. For how long? A. For forty years, or over.

Q. How far do you reside from him? A. Formerly I resided sixteen or eighteen miles away; since he moved to Statesville, I have been twelve miles away.

Q. Have you had opportunities to know him well? A. I think I have.

Q. Do you know his general reputation? A. I think I do.

Q. What has it been during all this time? A. It has been good.

Cross-Examination.

By Mr. WATSON:

Q. You were one of the Committee sent to the Treasurer in June, 1900, under the resolution, to enquire as to whether he had paid any money upon the White claim, were you not? A. I was.

Q. And report was made to the House? A. Yes.

Q. You ascertained he had not paid any? A. Yes.

Q. You were a member of the General Assembly of 1899? A. I was.

Q. That Legislature held a special session in June, 1900, and an adjourned session in the latter part of July, did it not? A. Yes; the first adjourned session was held on the 12th of June, I think.

Q. You say you have known Judge Furches many years; what was his reputation, and what do you know in regard to his political partisanship? A. Some considered him a very bitter partisan.

Q. I ask you, if you do not know the fact that he was so much so that his best personal friends who differed with him, always avoided approaching political questions in his presence? A. No, I do not know that. Some did not take the liberties with him that they did with others who differed from him.

Q. On account of his extreme bitterness? A. Yes; it was.

Q. You did not often take liberties with him yourself? A. We have always been good friends, but we never talked much about politics.

Q. You knew better than to do that, did you not? A....

Re-Direct Examination.

Q. You differed from him in politics? A. I always have.

Q. And you were always on the opposite side, and it has fallen to your lot to be rather active against the party to which he belonged? A. I have always been decided in my political views.

Q. And they were different from his? A. Yes.

Q. Did these political views between you and the Judge ever alter your relations in any respect? A. No.

Q. Did you ever have occasion to have him as your attorney?

(Objection. Objection sustained.)

Q. Usually you were not on the same terms with regard to the discussion of political questions to those who are opposed to you as you are to those in the same party?

(Objection. Objection sustained.)

The witness stands aside.

J. H. HOFFMAN, *a witness called in behalf of the respondents, upon solemn affirmation, testifies as follows:*

Q. Where do you live? A. In Statesville.

Q. How far from Judge Furches? A. About one hundred and fifty feet away; one house intervenes.

Q. How long have you lived so near to him? A. Twenty-two years.

Q. Have you known him well during all that time? A. Yes.

Q. Do you know his general character and standing in his home? A. I did.

Q. What is his character? A. His character is high for integrity. His standing is as high as anyone's.

Cross-examination was waived.

Dr. S. W. STEVENSON, *a witness called in behalf of the respondents, being duly sworn, testifies as follows:*

Q. Where do you live? A. In Mooresville, Iredell County.

Q. Were you a member of the present General Assembly? A. I was.

Q. Are you acquainted with Judge Furches? A. Yes.

Q. How long have you known him? A. About twenty-five years, more or less.

Q. Have you had an opportunity to know him well? A. As well as any other citizen in Iredell County.

Q. Do you know his general reputation? A. Yes, I think so.

Q. State what it is? A. His general character is as good as that of any man in Iredell County.

Cross-examination.

Q. Do you know the character of Mr. J. B. Holman? A. Yes.

Q. What is it? A. Good as any man's.

Associate Justice DOUGLAS, *one of the respondents, being duly sworn, testifies as follows:*

Examination.

By Governor JARVIS:

Q. Where were you born? A. In Rockingham County.

Q. When were you elected a Justice of the Supreme Court? A. In November, 1896.

Q. When did you enter upon the duties of your office? A. I swore in on the 1st day of January, 1897, and attended the February Term of the Supreme Court, that being my first term on the bench.

Q. What was the first of the office-holding cases that came before you after you went upon the bench? A. So far as I remember, it was *Wood v. Bellamy,* and I think the cases of *Person v. Southerland,* and *Lusk v. Sawyer,* were argued and decided at the same term. They were called the Asylum cases.

Q. What interests were involved in those cases? A. *Wood v. Bellamy* involved the control of the asylum for the insane, at Raleigh; *Lusk v. Sawyer* involved the control of the asylum at Morganton, and *Person v. Southerland* involved the control of the asylum at Goldsboro.

Q. Who were the plaintiffs in these actions, and under what did they claim? A. They claimed under the Act of 1897.

Q. Under what act did the defendants claim? A. They claimed to hold over, as I understood, claiming a vested right of office, as their terms had not expired.

Q. What was the decision of the Court in those three cases? A. Following the line of decisions originating in *Hoke v. Henderson,* and coming down, the decision of the Court was that where the tenure of office was vested, the officer could not be deprived of his office during the continuance of the office for his term by legislation subsequent to his acceptance of the office.

Q. So the Court was unanimous in that opinion? A. It was.

Q. What was the next case of general public interest that came before you? A. I think that, perhaps, there were some smaller ones; I think the Day case was the next of importance that came before the Court. I do not remember all of the cases. I have a list of them here. But the case of *Ward v. Elizabeth City* came up at the Fall Term, 1897, of the Court, and there the opinion in *Hoke v. Henderson* was expressly re-affirmed by a unanimous Court, although we held that it did not apply to a hold-over whose term of office had expired.

Q. Read over the titles of the cases concerning office-holding. A. I have here a memorandum; I may have omitted one or two. I have, at the February Term, 1897, reported in the 120th N. C. Report, *Wood v. Bellamy; Person v. Southerland,* and *Lusk v. Sawyer;* then, the next cases are

in the 121st N. C. Report, decided at Fall Term, 1897; *Wood v. Elizabeth City, Caldwell v. Wilson, Cromartie v. Parker, Shannonhouse v. Withers,* and *Harris v. Wright.* We decided at the February Term, 1898, reported in 122d N. C., *Barnhill v. Thompson, Houghtaling v. Taylor* and *Holt v. Bristol,* and in the 124th N. C., I find the cases of *Cunningham v. Sprinkle, Bryan v. Patrick, Railroad v. Dortch, Wilson v. Jordon* and *Cherry v. Burns;* in the 125th, I find *White v. Hill, Green v. Owens, McCall v. Garner, McCall v. Webb, McCall v. Zachary, Ledford v. Green, Abbott v. Beddingfield, Dalby v. Hancock, Gattis v. Griffin,* and *Herring v. Pugh,* and in the 126th I find *Dowtin v. Beardsley, Baker v. Hobgood, White v. Murray, Mitchell v. Allen, McCall v. Webb, Mott v. Griffith,* and *Wilson v. Neal.* There may be several other cases in the 127th N. C., which is not out, and which I have not been able to get. I have put down no cases in the 127th N. C. I said that perhaps the next most important case was Day's case, but I find that the case of *Caldwell v. Wilson,* in which an opinion was rendered at the February Term, 1897, reported in the 121st N. C., was a case of importance. In that case the claimant claimed by virtue of an appointment from the Governor under the provision of the Railroad Commission Act; the incumbent claimed to hold over, and cited *Hoke v. Henderson.* I wrote the opinion, and there were other grounds also, but that was the most important. It was held that *Hoke v. Henderson* did not apply, because the provision under which the Wilsons were removed, was in the act under which they were appointed, and therefore a part of their contract of office, and we drew the distinction between *Hoke v. Henderson* and this case, where a man accepted an office under the condition that he might be removed; that it was a part of the contract, and binding upon him, and the State; but where the contract was complete and acted upon by both

parties, without any such condition, we held a removal unconstitutional under *Hoke v. Henderson;* perhaps I can best express my views by citing some short extracts from *Caldwell v. Wilson:* "The celebrated case of *Hoke v. Henderson,* 15 N. C., 1, recognizes, to a great extent, the same principle. While deciding for the defendant, on the ground that an office is the property of the incumbent by mutual contract, and that the unconstitutional provision was not that of a law prescribing a rule of property or modifying the extent of interest or the tenure prospectively, but interfered with vested rights, Chief Justice Ruffin (page 17) says: 'that the purpose of creating public offices is the common good, is not doubted. Hence, most of the rules regulating them have a reference to the discharge of their duties and the promotion of the public convenience; they are *pro commodo populi.* Hence, they are not the subjects of property in the sense of that full and absolute dominion which is recognized in many other things. They are only the subjects of property as far as they can be so in safety to the general interest, involved in the discharge of their duties. This Court has recently had occasion to reaffirm the doctrine laid down in that oft-quoted decision, which has become too firmly established in the policy of laws now to be questioned; but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may be doubted if the great Chief Justice himself ever contemplated the extent to which it would be carried, and least of all, that its most extreme construction would be invoked to bring the tenure of high official positions within the operation of an amendment to the Federal Constitution primarily adopted for the protection of the colored race."

(I will add that one of the views of the defendant was

that his removal was not only in violation of the State Constitution, but was also in violation of the 14th Amendment to the Federal Constitution.)

"But our decision in the case at bar does not conflict with that in *Hoke v. Henderson.* The statute now under consideration is not retrospective, and does not interfere with any vested right. Being a part of the act originally creating the office of Railroad Commissioner, it *'prescribes'* a rule of property in said office, and modifies the extent of interest and tenure therein *'prospectively.'* The defendant, taking under the act, holds subject to the act; and relying upon his contract, is bound by all its provisions. One of its express provisions was the reserved right of the Legislature to remove, and the power and duty of the Governor to suspend under a given state of facts. This power of suspension, together with the necessary method of its enforcement, was assented to by the defendant in his acceptance of the office.

And again, on page 472, the Court says: "That the defendant has not been deprived of his property without due process of law; that the only property he could have in the office was that given to him by the statute, which must be construed in all its parts. His commission, which is his title deed, appears to us with the fateful words of the creative act written across its face by the hand of the law. Whatever right to a trial by jury he might otherwise have had, was waived by his acceptance of the office under the conditions of the statute, at least, so far as the action of the Governor was concerned."

Q. What was the result of the decision in that case? A. It held that the suspension by the Governor held good until the subsequent action of the Legislature, as was provided for in the act.

Q. From what county did the case come? A. I think, from Iredell County.

Q. Final judgment was entered in this Court; how was it enforced? A. By writ of mandamus, or rather of a motion and in possession, as it would be more properly called. The judgment in the case is as follows:

"This cause coming on to be heard in the Supreme Court, and having been decided in favor of the plaintiff, it is adjudged and decreed:

1. That the defendant has been lawfully suspended from the office of Railroad Commissioner.

2. That the relator has been duly appointed to fill the vacancy caused by the suspension of the defendant.

3. That the defendant be ousted from, and the relator inducted into said office of Railroad Commissioner.

Therefore, let a writ issue out of this Court, directed to the Sheriff or other lawful officer of Wake County, commanding him to oust the defendant and put the relator in possession of the room occupied by the Railroad Commissioners in Agricultural Building, on Edenton Street, in Raleigh, and known as the Railroad Commission office, together with all property, papers and effects appertaining or belonging to said offices.

4. That the plaintiff relator recover the costs of this action, to be taxed by the Clerk of this Court.

(Signed) WALTER CLARK,
Justice Supreme Court."

Q. Was there any dissent in that case? A. Chief Justice Faircloth alone dissented.

Q. State whether your recollection of the questions involved and the decisions made in the cases, not mentioning Days' case, *Abbott v. Beddingfield,* and *White v. Hill,* is the same as that testified to by Judge Furches? A. I think so. I may add that as I did not write the opinion in any of the important office-holding cases, except *Caldwell v. Wilson,* I am not familiar with them as Judge Furches is, but his statement is in accordance with my recollection. I may, perhaps, state that *Caldwell v. Wilson* was carried by writ of error to the Supreme Court of the United States, and was there affirmed.

Q. Coming to Day's case; state what was involved in that

case? A. As I understand it, the office of Superintendent of the Penitentiary.

Q. Under what title did they claim? A. Under appointment by the Governor, to fill, I think, an unexpired term.

Q. Was he plaintiff or defendant? A. I think Day was defendant, in possession. I think the title of the case was *"State's Prison v. Day;"* a reference to the report will show.

Q. Upon what principles or precedents was that case decided? A. We regarded it as coming under the general principle first enunciated in *Hoke v. Henderson,* and subsequently followed in *Wood v. Bellamy,* that Day had a vested right of property in his office for the term, which could not be divested or devested as long as his office practically remained in existence.

Q. In what particular did that case differentiate itself from *Wood v. Bellamy?* A. In *Wood v. Bellamy,* the Act expressly, and in so many words, abolished certain offices, and in the same act provided for the same offices under different names. We held it was, in legal effect, a continuation of the same offices. In Day's case, I think, the abolition of the office of Superintendent was in the same act as that creating the Executive Board, and that the duties of Day were practically continued and devolved upon the Executive Board; we held that he could not be deprived of his office by a method which, to our mind, appeared to be identical in principle with *Wood v. Bellamy;* further than that, I do not think the decision interfered with the act of the Legislature, but gave it full force and effect, except in so far as it interfered with Day's vested right of property, as we understood.

Q. Passing from that case to *White v. Hill,* what was involved in that case? A. I think that was similar to Day's case; that is, that it attempted to abolish the office held by White, but kept alive the same duties and responsibilities

and divided them up among seven other men; in other words, it appeared to us that while the Legislature abolished the office of Chief Inspector, it was not their intention to abolish the duties or responsibilities of the office, but in legal effect, they were to be performed by seven men. We regarded it as coming under *Hoke v. Henderson, Wood v. Bellamy* and Day's case. We felt compelled to declare that White could not be deprived of his office during his vested term. Further than that, the act would have its effect. I think the principle *in pari materia* was really first invoked in the case of *Wood v. Bellamy;* the cases were ably argued by distinguished counsel.

Q. Was that principle also involved in *White v. Hill?* A. Yes.

Q. Be kind enough to explain to the members of the Court what that doctrine is? A. That it is the duty of the Court to construe all parts of the same act together, and also all acts relating to the same matter passed by the same session of the General Assembly; in some cases, it even becomes necessary to construe an act in connection with an act passed at a different session of the Legislature; that is done to ascertain the meaning of the Legislature, or rather the legal effect, and to carry it out as far as possible when it is not in conflict with the Constitution, or some vested right which is constitutional.

Q. Can you state any well-established precedents in this State for such construction of statutes? A. In *Wood v. Bellamy* we arrived at our conclusions by construing all patrs of the same statute together, and held that while the statute expressly abolished certain offices, that considering all of its parts together, its effect was to continue the offices in existence, and therefore to continue the terms for which the incumbents had been appointed. That was the doctrine. Taking the principle enunciated in *Hoke v. Henderson,* that an officer had a vested right of property in the term of the

office in which he was appointed, and recognizing the doctrine *in pari materia,* and construing all parts of the statute together, we held in *Wood v. Bellamy,* and other cases, that the legal effect of the statute was to preserve the offices under different names with slightly different duties, and that it was not the intention of the Legislature to abolish the asylum. Therefore, we decided in favor of the incumbent, and the same principle is held to apply to different statutes. I will read a few extracts from an opinion written by me in *Green v. Owen,* 125th N. C., at page 212. This is one of the few cases I wrote and expressed my views more concisely than I can give expression to them orally: "The new Board of County School Directors, created for the same general purposes and charged with the same general duties, is, in effect, but a continuation of the old Board under a new name. A careful examination of the two acts will show this to be so, and the few changes that were made, and other non-essentials, do not materially affect the question. The identity of the chrysalis is not changed, even by the gorgeous wings of the butterfly, as the same individual life runs through all its forms. It is well settled that statutes *in pari materia* are to be construed together, certainly when passed at the same session of the Legislature, and, under certain circumstances, even when passed at different sessions. *State v. Bell,* 25th N. C., 506, 508; *State v. Woodside,* 31st N. C., 496, 501; *State v. Melton,* 44th N. C., 49; *Simonton v. Lanier,* 71st N. C., 498 and 503; *Rhodes v. Lewis,* 80th N. C., 136, 139; *Wilson v. Jordon, supra,* page 687; Black. on Interpretation of Laws, sec. 86; English Interpretation of Statutes, sec. 45; Potters' Dwarris on Statutes, 190. Many cases from other jurisdictions are cited in the above authorities." All the cases appeared to us to be sustained by the doctrine of *in pari materia* as applied, not only to all parts of the same statute, but to all statutes passed at the same session of the Legislature. Orig-

inally, in contemplation of law, we learn from the text-books that all statutes passed at one session of Parliament were construed as one statute, and were not designated as this or that statute, but as such and such chapters of the statutes of that parliament, and from that comes our present method as referring to statutes as chapter so and so of a year.

Q. Do I understand you to say that these two principles were involved in the decision of *Wood v. Bellamy* and the office-holding cases? A. As I understood it, they were. It was these two principles which made me concur in the decision.

Q. You started to say something about *Wood v. Bellamy,* it being ably argued? A. I mean the matter was ably argued orally and by brief, and was carefully considered by the Court, as well as by myself, personally.

Q. Did those appearing for the incumbents in the asylum cases insist upon those two propositions of law? A. Yes; in their argument.

Q. Do you remember who the counsel were in those cases?

Mr. WATSON: "We object to that question."

The PRESIDENT: "I sustain the objection."

Q. Coming back to White's case, I wish you would take it up again, and say whether the same principle in *Wood v. Bellamy* was involved in White's case, and if not, what principle was? A. I think so. White's term of office had not expired and under the same principle of *Wood v. Bellamy* and Day's case, the Court held that giving it to seven men made no more difference to White than if it had been given to one man. In other words, that to deprive him of a vested right, what became of it was nothing to him; the injury was just as great and the violation of the law was just as strong by taking it away from him and giving it to seven men to perform the same, or nearly the same duties, and that there was a continuation of the office.

Q. What was the decision in that case. A. That he was entitled to hold the office during the remainder of the term for which he had been appointed.

Q. Was the case decided by a divided or by a unanimous Court? A. There was one dissent, I think, by Judge Clark; I do not remember whether Judge Montgomery dissented.

Q. Do you remember when the opinion was filed? A. I have no particular recollection.

Q. At what term? A. It is in the 125th Report, and I think that would be Fall Term, 1900.

Q. Coming now to the mandamus case of *White v. The Auditor*, when did that case first come into the Supreme Court? A. I think it was at Fall Term, 1899.

Q. What was the first motion made in the case in the Supreme Court? A. I think the first motion was to advance the case and hear it at that term.

Q. In a matter in which the State is interested is that usually done? A. Yes; unless it would interfere with the rights of other litigants. It is customary to give public cases that preference.

Q. Then there was nothing unusual in advancing the case? A. I think not.

Q. It was done at what term? A. I think at the Fall Term of 1899, and it was held over under *advisari.*

Q. When was it determined? A. I think the opinion was filed on May 22, 1900.

Q. How long after the filing of that opinion was it before the adjournment of the Court? A. I think the Court adjourned on June 14th.

Q. Can you tell me how the Court came to sit so long during that term? A. Yes; I think I was largely responsible for a few days of the additional sitting; my health had not been good and I had had some very important cases, to which I felt it my duty to give unusual consideration. I

remember the case of *Debnam v. Telephone Co.* involved the constitutionality of the Craig Act, and that I was required to write the opinion by the Court. I think I gave at least two weeks of solid study to the matter, to the exclusion of everything else, except attendance upon the bench and conferences. Then there were four or five important cases which had been assigned to me in which the Court was divided, and in some evenly divided, and I was compelled to write the opinions. Judge Faircloth and Judge Furches got through all their work. They had nothing to do, and wanted to go home. Judge Clark kindly suggested, and it was concurred in by Judge Montgomery, as he and Judge Montgomery lived here, if I would remain and write up the cases they would hold the Court open for me until I could file the opinions. That was done. I do not think we left over any opinions at that term. I felt some pride in not being the only member of the Court to leave unwritten important opinions. It was a favor to me and enabled me to file opinions which had not been prepared, but which had been determined upon by the full Court, some with dissent and some without.

Q. Coming back to the mandamus, state whether you knew anything of the facts in that case other than those stated in the opinion of the Court? A. No; I did not. I do not know that I ever heard of the matter. I certainly had no occasion to know them or to inquire as to them; I had no personal interest in the matter.

Q. Was any suggestion made by counsel or parties as to the venue of the case? A. I think not; I think it was heard on a case agreed, and that all parties were anxious to arrive at a final determination of the question without making technical objections. That was the impression made upon me.

Q. Was the case actually argued in your Court? A. It was.

Q. What was the opinion of the majority of the Court? A. The opinion of the majority of the Court was that White was entitled to his writ of mandamus. His right to the office had been determined by the Court by the previous term, and this suit was to enforce the judgment; in his complaint he asked for a mandamus. It was the object of the suit, and the judgment of the Court, as I understood it, was that as his right to the office and to his salary had been determined, he was entitled to the ordinary method of obtaining the salary.

Q. Did you personally know White at that time? A. I do not recall having met him until the other day. I may have seen him, but have no recollection of it.

Q. Holding him to be entitled to the mandamus, state whether you were influenced by any other motive than that of declaring the law as you understood it. A. I was not; I am not aware of any possible motive that could have influenced me in the case.

Q. After you filed the opinion, you all went home; when did you next hear of any trouble about the mandamus or its issuing? A. I do not remember now; I am under the impression that the first I heard of it was when Harris came into the Court and complained, in substance, that he could not get his money.

Q. Tell us what took place when he came into the Court; what did he do and say, and what was said by the Judges? A. My recollection is substantially the same as Judge Furches described; I did not charge my memory with the facts, as I did not regard them of importance, and do not think I said anything at all.

Q. When did the matter come before the Court again? A. I think something was said the first time about a want of notice. My impression is that he said that he had not given notice; that when he appeared the second time, Judge Cook appeared with him in Court, and Mr. Harris stated that

notice was waived. It was then, I think, the question was asked him if he filed any affidavit for written motion. My impression is, the question was asked by Judge Furches, and I think Judge Montgomery said something to the effect that he should apply to the Clerk.

Q. And nothing was done in Court? A. I do not think any Judge consulted me about the matter, and I do not think I said anything.

Q. When did you next hear from it? A. The dates are not very clear to my mind, but I think a few days afterwards Col. Kenan came into conference. I think that was the first time he spoke to me, and said that Mr. Harris had applied in writing for the writ in proper manner, and he thought it was his duty to issue it, but that in consequence of what had been said to him, I think, by a member of the Court, he wanted to be protected. In other words, he wanted the Court to instruct him to issue the writ. That the Court declined to do, on the ground that there was nothing before the Court on which the Court could act; then Col. Kenan may have come in twice. I remember on the 15th, as it appears from a memorandum of that date, that Col. Kenan came to my room at night, and again stated that he thought it was his duty to issue the mandamus under the former opinion of the Court, but that in consequence of Judge Clark's action he wanted the protection of the Court, that is, an order of the Court, to issue it, or, at least, an order of the majority of the Judges, who concurred in the opinion. I will state that it was before that that Col. Kenan had brought a copy of the order of Judge Clark and a copy of the dissenting opinion, which I have with me. To go back to the night of the 15th, I told Col. Kenan that there was nothing before the Court; that I did not think I had any right to instruct him in my private capacity; that I could not do so in my official capacity as a member of the Court, because there was nothing upon which

such action should be based, and that no opinion of mine would protect him. To the best of my recollection, I said to him on that occasion that if he wanted to be fully protected he might refuse to issue the writ and have a rule served to show cause and the matter would come before the Court in its official capacity, where the Judges could act as a Court; that, I understood, he did not wish done, because he did not wish to antagonize the Court. He then asked me for my personal opinion, and as it seemed to be the impression among the Judges that he was entitled to our personal views, I wrote this paper and read it to him:

"I do not think that as an individual Judge I have the right to instruct the Clerk of this Court; nor have I the individuai right to authoritatively construe a decision of this Court, but I have no hesitation in saying, that in my opinion the intent and legal effect of our judgment in *White* v. *The Auditor*, was to entitle the plaintiff to the writ of mandamus—that was the object of his suit; and that it becomes the duty of the Clerk of this Court to issue such writ in accordance with that opinion upon the application of the plaintiff."

Upon the back of the paper is endorsed:

"The within paper was read to Col. Kenan in the presence of Judge Furches, this October 15, 1900."

I may add that my object in reducing it to writing was to preserve what I had to say to prevent any misunderstanding as to my action on account of the papers filed by Judge Clark, as well as some remarks which he ha dmade;I think it was the following morning, or afternoon, that Col. Kenan came in again and asked for instruction,which,I understood the Court declined to give. He then asked for their personal views. I repeated this paper, word for word, from memory. I may have made, perhaps, the change of a word, but what I said was as is contained in this paper, with scarcely a change of word, and certainly not of substance. Think Judge Furches told him he thought it was his duty to issue the writ. I

think Judge Furches used the expression, "as an individual, I think you ought to issue the writ." I think that was his expression. There was a good deal of conversation in the Court.

Senator HENDERSON: "I would like to offer a resolution:

"*Resolved,* That the record of the impeachment trial be made complete by prefacing the record of the session of the Senate before it was organized as a court, when the Committee of the House of Representatives gave notice of the action of the House, and also when the articles were presented by the House, and that the record shall include the articles and the Rules; that if this can not be done without an expensive re-arrangement of paging, it shall be done as an introduction."

The PRESIDENT: "I will state that the resolution of the General Assembly requires that to be done."

Senator HENDERSON: "I want it included in this record as an introduction."

The PRESIDENT of the Court here stated that the first day of the meeting of this body as a Court of Impeachment was February 25th.

Senator FOUSHEE: "What we desire is to only have a complete record for use here. I suggest that the Articles be printed and bound with the record of the Court, and that copies be printed and distributed among the members and the counsel."

The hour of adjournment having arrived, the Court is adjourned by proclamation of the Sergeant-at-Arms.

AFTERNOON SESSION.

THE SENATE CHAMBER.

Tuesday, March 19, 1901.

The PRESIDENT: "The Sergeant-at-Arms will open the Court."

The Sergeant-at-Arms makes due proclamation.

The PRESIDENT: "Call your witness."

Mr. JARVIS: "Judge Douglas will please take the stand."

Q. When the Court adjourned we were enquiring about what took place in the conference when Colonel Kenan was asking the advice of the Court. State, Judge, whether you ever spoke to Colonel Kenan on the subject of issuing a mandamus, except in response to some inquiry from him? A. I did not. He always first introduced the subject to me on every occasion in which it was mentioned.

Q. Now state again—I think we had not gotten to the second conference—state what occurred the second and last conference when the Judges were all together? A. I am pretty clearly of the recollection that the last conference was on the 16th. I think it was either the afternoon or the morning of the 16th; I think it was the morning. The reason I am clear is because it was the day following the night when I read this paper to Colonel Kenan. Colonel Kenan came in and again asked for the advice of the Court. I think, perhaps, Judge Furches spoke first, and told him he thought it was his duty to issue the writ as authorized by the former opinion and judgment of the Court. I think then that Judge Faircloth said, "Speaking as an individual, I think you ought to issue the writ," or words to that effect. I then repeated the words of this written paper. I may have changed one or two words, possibly, but nothing that altered its sense. Judge Clark and Judge Montgomery both expressed themselves against the authority of the Clerk to issue the writ.

Q. Had you ever seen the writ before it was issued? A. I had not. I was not consulted in preparing the form of the writ; did not know that it was being prepared, and did not see it until after the beginning of these impeachment proceedings.

Q. Can you recall the day or the evening that Colonel Kenan delivered to you the paper called the protest, or the opinion, of Associate Justice Clark? A. Yes; I think it was in the day time, either morning or afternoon, before he called at my room, that night, when I read him that opinion. He came to my room and handed me these papers, one of which purports to be an order signed by Walter Clark, instructing the Clerk not to issue the writ of mandamus. The other is headed: "Clark, J., Dissenting," which is the usual form of a dissenting opinion. I did not see the word "protest" on either.

Q. Will you now tell us what took place in conference concerning that paper? A. There was some little confusion in conference, I mean some talking across the board, and I don't remember very clearly what was said, except that Judge Clark wanted, what I understood to be, his order to the Clerk spread upon the minutes of the Court, and his dissenting opinion published in the 127th Volume of the Reports, which is not yet out. That was objected to on the distinct ground that there was nothing before the Court, that the Court had taken no official action, and had filed no opinion from which he could dissent. A dissenting opinion implies, of course, a decision by the Court, from which it is supposed to dissent, otherwise there is no meaning. There are two objects in a dissenting opinion. As I understand it, one is to enable each individual Judge to express his own opinion about any matter decided by the Court. Another, and to my mind a higher object of a dissenting opinion, is to suggest to the Court the objections of any particular Judge,

in order that the Court may consider them, and, if proper, may modify its own opinion in accordance with the dissenting opinion; in fact, I have known several instances in which, after the opinion of the Court had been prepared and sent around to the Judges, the dissenting opinion was adopted as the opinion of the Court with, of course, such modifications as might be necessary for the purpose. For that reason it is a rule, clearly understood, that the dissenting opinion should be filed at the same time as the opinion of the Court, and, of course, transmitted to the Judges before the opinion of the Court is filed, so that they may give it careful consideration. Then, when the opinion is filed, if the Judge is not willing to hold up the opinion of the Court, then the dissenting Judge can give notice of his intention to file a dissenting opinion, but in all cases I have ever heard of that opinion has been filed before the termination of that session of the Court. After the session of the Court is adjourned, I don't think that anything relating to that case could be inserted in the opinions of the Court, because there is nothing before the Court from which any Judge can further dissent. I state that, because those are the reasons which influenced me in declining to permit Judge Clark to file a dissenting opinion when he had already filed a dissenting opinion when the case was before the Court, and that dissenting opinion had been published in the proper volume of the Reports. I knew of no precedent or reason which would justify me in voting to allow an additional dissenting opinion to be filed at that time, nor could I admit that any one Judge had a right to instruct the Clerk not to obey the judgment of the Court, and hence I did not feel at liberty to authorize, as far as my vote was concerned, the Clerk to spread upon the minutes Judge Clark's order to him, which I was forced to regard as purely a personal matter between Judge Clark and the Clerk.

Mr. Manager ROUNTREE: Do you refer to the protest; is that what you call the order? A. I call this paper the order.

Mr. Manager ROUNTREE: "I only wanted to know if that was the paper you referrd to."

Q. Have you anything further to say, Judge, about your reasons for not wanting the papers to go on record? A. That is all. I want to say that in the impeachment proceedings I found a paper which is essentially different from this, and which, from the testimony I have heard, appears to be an amended or eliminated copy of Judge Clark's dissenting opinion. When those corrections were made I do not know. They were not made in my presence, nor have I ever seen his opinion after it was corrected, until the beginning of these impeachment proceedings. I think I saw it the first time in the report of the Committee of the House of Representatives.

Q. What occurred the day that he asked that those papers go in the records? A. There was some conversation between him and Judge Furches, and some conversation between him and Judge Montgomery, as to the character and nature of his dissenting opinion. I think I stated to him, perhaps in a laughing way, that I did not think there was any place for them in the opinions, and, if published at all, they would have to be published among the obituary notices, and, if he wanted it there, I did not know that I would object. He did not seem to take very kindly to my suggestion, nor did he resent it. It was said very pleasantly.

Q. State whether you have on any occasion ever taken any part in preventing any member of the Court from filing any dissenting opinion, or any protest, against the action of the Court in any matter before the Court? A. I have not. I do not remember, either since I have been on the bench, or before, of any protest ever having been filed by any member of the Court. So far as preventing, or attempting to pre-

vent, any member of the Court from filing a dissenting opinion, I have, on the contrary, always insisted upon that as his right. In other words, I think that every member of the Court is entitled, in a proper dissenting opinion, to express his opinion of the law and the facts of the case. I have exercised that right myself. I have always freely accorded it to others.

Q. State whether you have ever taken any part in withholding from your Associates any courtesy or privilege they were entitled to under the law? A. I do not think I ever have. I certainly have never intended to do so.

Q. In considering the acts of the Legislature that have come before you, were you actuated to declare the law as you understood it, or to bring the Legislative Department into disrepute? A. I have never sought, or tried, or intended, in any way, to bring the Legislature of North Carolina into disrepute or disrespect. On the contrary, I have tried under any and all circumstances, to maintain its authority and to give to it the fullest credit to which it is due under the Constitution of North Carolina. Whenever I have been forced to declare any of its acts unconstitutional, I have always given to the Legislature the benefit of the doubt, and have refused to declare them unconstitutional, unless, to my mind, they were plainly so. When they were unconstitutional, and it became my duty to decide them as such, I have endeavored, as far as possible, to eliminate all parts that were unconstitutional and let the remaining parts stand. In other words, I have sought, in accordance with my own feelings, and with what I believed to be a settled rule of decision, to carry out every act of the Legislature that is not unconstitutional. I have so expressed myself in writing the opinions of the Court. I say in the case of *Green v. Owens,* 125th North Carolina, on page 221: "The principles enunciated equally require us to hold that the remaining plaintiffs, Green and Sheets,

are not entitled to be members of the County Board of School Directors, as they were not elected until after the passage of the Act of 1899, and therefore had no vested rights that could be affected by the passage of said act or any election held thereunder. In fact, they never were members of the Board, as at the time of their assumed election there were no vacancies to be filled. The vacancies caused by the resignations of Miller and Holmes were filled *eo instanti* by the appointees of the Legislature, who were somewhat in the nature of remaindermen waiting for the determination of the particular estate.

"It is urged that there are three legislative appointees and only two eligible places, but this does not concern the plaintiffs, and the defendants are not asking us to adjudicate their respective rights as between themselves. It may be that the two who first qualified, filled and exhausted the vacancies. If so, the third man must wait the determination of Nifong's estate in the office.

"In all the similar cases that have been brought before us, we have never held the act to be unconstitutional, except in so far as it interfered with the vested rights of the incumbent. The Legislature had ample authority to pass chapter 732 of the Laws of 1899, and also had authority to elect, as they did, by chapter 3 of said Laws, subject only to the rights of the incumbent. Of course, where the vacancy was already filled by the continuation of the term of the former incumbent, there was no room in that particular office for anyone else until a vacancy occurred by the expiration of the term, resignation, death, or disqualification.

"Every act of the Legislature carries with it the presumption of constitutionality, and, where it becomes our duty to declare any part of such act unconstitutional, it is equally our duty to give full force and effect to the remainder of such act, provided it remains capable of operation. In other

words, we should give effect to the expression of the legislative will, so far as it does not conflict with the organic law, and should declare it utterly void only when its unconstitutionality so far permeates its essential features as to destroy its practical operation."

I cite: *Berry v. Haines,* 4th N. C., 428; *McCubbins v. Barringer,* 61st N. C., 554, 556; *Johnson v. Winslow,* 63d N. C., 552, 553; *Gamble v. McCurdy,* 75th N. C., 509, 512; *State v. Joyner,* 81st N. C., 534, 537; *Riggsbee v. Durham,* 94th N. C., 800, 805; *State v. Barringer,* 110th N. C., 525, 529; *McCless v. Meekins,* 117th N. C., 34, 39; *Russell v. Ayer,* 120th N. C., 180, 189; *Rodman v. Washington,* 122d N. C., 39, 42; *Packet Co. v. Keokuk,* 95th U. S., 80; *Cooley's Const. Lim.,* 178, 215.

I read this to show that that was my opinion and purpose, and so declared before any impeachment proceedings were begun, or, as far as I knew, even contemplated. Such was my opinion then, and such has been my purpose to give to it full authority and to uphold its authority, as far as I can in obedience to my oath to support the Constitution of the State of North Carolina.

Q. State whether in rendering your opinion as a member of the Court you have ever been influenced by any partisan, political, or other motives than to declare the law as you believed it to be? A. I have never been influenced by any partisan or political motives in the decision of any question or matter that has ever come before me as a Judge. When I first came upon the bench, I had been elected by the people. I took my seat on the 1st day of January, 1897. I had, as far as I am aware, never given any attention to these office-holding cases, nor do I think that I had then ever read the opinion of *Hoke v. Henderson,* nor could I have any personal motives in then giving it the full effect that I did by my vote. The matter came before me in what are called the

Asylum cases, that is, *Wood v. Bellamy, Lusk v. Sawyer,* and *Person v. Southerland,* involving the control of the Central Asylum at Raleigh, the Eastern Asylum at Goldsboro, and the Western Asylum at Morganton. Those cases were argued, personally and by briefs, by exceedingly able counsel on both sides.

Mr. WATSON: "To show that he has gone over this exactly, he stated before dinner who the counsel were; the same names and the same cases."

Mr. JARVIS: "That was in response to a question, naming the counsel. I am now asking him what is alleged in the Articles of Impeachment; that he has acted upon the bench as a partisan. That is what he is now giving."

Mr. WATSON: "I am not objecting to that in the world. If he answers every time you put a question like that, we will be a month here."

A. I wanted to say, if it is proper—if it is not, of course I expect to be stopped—that my judgment then was influenced by the argument, that I acted free from any partisan bias; that I acted against my political friends solely upon the argument of the distinguished counsel who represented the defendants in those cases. The briefs were filed and I gave them careful consideration, and the result of that investigation, of that consideration, was that I gave my decision as a Judge on the doctrine enunciated in *Hoke v. Henderson.* Having done that then, I felt it my duty when other cases came up to do as I had done on *Wood v. Bellamy.* I offer these briefs as showing what influenced my decision in *Wood v. Bellamy,* and in every decision since involving the decision of *Hoke v. Henderson.*

Mr. JARVIS: "I ask the Court that we may file those briefs."

Mr. C. M. BUSBEE: "We object."

The PRESIDENT: "I sustain that objection."

Mr. COOK: "Will you hear us? I want to say, that according to our view in this case, it is a question of not only violating the law of the land, but with what intent they did it. He says, sir, that the argument which was delivered then, and he has it there in its written expression, greatly influenced this judgment. Now, sir, it was what he was required to hear. It was his duty to hear it and give it consideration. I say, sir, that he was obliged to hear that argument. I say that we are entitled to have it go in."

Mr. WATSON: "The counsel puts up his man of straw and then knocks him down. Are these Articles of Impeachment against these gentlemen in that case of *Wood v. Bellamy.*"

Mr. COOK: "I would not have done it, but he said that these followed, and these briefs had been a consideration with him in the trial of these last cases."

Mr. WATSON: "Let us see about it. Hope my friend won't get excited. Have we made any complaint against *Wood v. Bellamy?* It is this whole drove of cases that have followed Wood and Bellamy in quick succession, that have used Wood and Bellamy, and Hoke and Henderson, on the same base of operations, overriding the legislative authority in after years. We don't say that *Wood v. Bellamy* is wrong, if you will let them stay where they are, but our charge is, that since that time that these cases were followed,and looking to those cases, this Court has gone far beyond them and has violated the Constitution. Now, the case of *Wood v. Bellamy* was based upon *Hoke v. Henderson,* and we say that you can not convict or impeach a member of the Supreme Court of North Carolina for following *Hoke v. Henderson,* but we say that, following those cases,this Court has departed from them and has gone out and, with specious arguments, they have decided partisan cases, under which we make one of our Articles of Impeachment. We don't admit that a brief is admissible in

any case. If a Court could do that, all that would be necessary for a lawyer who wanted the Constitution violated to carry out his partisan ends, if he had great reputation, would be to shape a brief. If a brief was admissible, then it would be admissible to bring witnesses here to prove what kind of oral argument was used by some eminent lawyer."

The PRESIDENT: "I think it is competent for him to say that he was influenced by an argument, as this Court would be influenced."

Mr. OSBORNE: "I was just going to call your Honor's attention to something which your Honor is probably losing sight of. All the North Carolina Reports are admitted here. If the gentleman will just turn back and look, he will find briefs on either side by counsel. Now, it is competent evidence. The brief of *Hoke v. Henderson* is filed here. Now, if that is competent, why not let *Wood v. Bellamy* be competent? Why is it thus? I could hardly add anything to the force of Capt. Cook's argument. It seems to me absolutely irresistible."

The PRESIDENT: Q. What case is this? A. It is the brief that was filed with the Court upon the hearing of the cases of *Wood v. Bellamy, Lusk v. Sawyer* and *Person v. Southerland,* and which were used by me in determining my action upon that matter. I offer them as simply showing that so far from being influenced by any political motives, that I was influenced by arguments. These are the original briefs handed to me on that trial, and which I have preserved ever since.

Mr. F. H. BUSBEE: "Your Honor will please read the fifth Article."

The PRESIDENT: "Is this one of the Articles offered in this case? All I want to know is whether *Wood v. Bellamy* is offered by them."

Mr. C. M. BUSBEE: "There was no brief offered by us

in connection with those records. What was offered by the Clerk was the original transcript of evidence in his office, together with the judgments entered in the particular case, and if a brief, without our knowledge, happened to be included in any particular case, it was not intended by us."

Mr. WATSON: "Before we offered any evidence at all, Mr. Allen, in his opening speech, declared what our case was and, as will be remembered by the gentlemen on the other side, our complaint commenced with Day's case, and we say there was no complaint to this Court until after the Legislature of 1899 was elected. That is our complaint. We certainly did not charge that *Wood v. Bellamy* was cited."

The PRESIDENT: "I think, after reading Article 5th, that this evidence is competent, going to the intent, pure and simple."

(See Exhibit "K," page 431.)

Mr. JARVIS: Q. Now, go on Judge. Did you finish your answer to the question whether you had ever been influenced by partisan or political motives? A. I have never consciously, and I don't think I could have been unconsciously influenced by any partisan considerations. I made up my mind in *Wood v. Bellamy* that *Hoke v. Henderson* was the law in North Carolina, whatever it might be elsewhere; that it had long been the law, and it would be in the highest degree improper in me to attempt to overrule it. I may add that, upon consideration, I became convinced that *Wood v. Bellamy* was not only the law, but it ought to be the law, in 1897, when I voted for gentlemen opposed to me politically. And as there has been no change in the Constitution, if it was the law in 1897, it has been the law ever since, and it being the law, I was bound to carry it to its reasonable conclusion, whatever might be the consequences to me or to anyone else.

Mr. JARVIS: "I will ask the Court now to please hand the witness the questions asked by Senator Henderson."

The PRESIDENT: "You are at liberty to do so. I can not give them to him."

Mr. JARVIS: Q. Why was it necessary to issue a writ of mandamus against the Treasurer before the debt had been determined either by the Supreme Court or the Auditor? A. Now, I understand that the case agreed presented to us the simple question, or rather two simple questions, as to whether White was entitled to pay, and, if so, at what rate of compensation. Those questions were submitted to us by both the Auditor and Treasurer, as we were told, for their information. We decided all that was before us, and having so decided, and both the Auditor and Treasurer being parties to that action, it was deemed proper that the mandamus should be issued to both, commanding the Auditor to audit the claim, and the Treasurer to pay it. We laid down the rule on which it was to be audited, we said how much was his salary; but how long he had served and what expense he had incurred, and the other details we thought belonged to the Auditor by law. He could have proceeded to audit the claim without a mandamus from us, and the Treasurer could have paid it without a mandamus.

Q. In the mandamus issued, did it still leave the Auditor free to exercise the discretionary power vested in him by law?

Mr. WATSON: "That is a question of law."

Mr. JARVIS: "Very well, I don't want to contend against the ruling of the Court."

Q. How could the Clerk of the Supreme Court know what the Auditor would do, or had done, in regard to determining the amount of the claim? A. I don't suppose the Clerk had any such knowledge, as all that was before him was before us —what was in the case agreed. That the Auditor would perform his duty according to law, and according to the decision rendered by the Supreme Court, I think was a presump-

tion of law. I may say the Supreme Court frequently issues an order to a subordinate officer to exercise his discretion. If the Judge of the Supreme Court refuses to exercise his discretion, or states that he has no discretion in law, then that question is appealable, and if the Supreme Court thinks he has such legal discretion, it directs him to proceed and exercise his discretion, but leaves him free as to what he will decide in that discretion.

Q. How could the Supreme Court know that the Auditor would determine with accuracy the amount of the claim? A. After we had decided the only questions before us—which were in the case agreed—we presumed, of course, that the Auditor would properly audit the claims, as that was a duty placed upon him by the Constitution and the laws, and with that discretion we did not intend to interfere.

Q. Why did not the Supreme Court order a reference to ascertain the true amount of the claim before ordering or permitting the mandamus to issue against the Auditor or Treasurer? A. Of course, I can only speak for myself alone, but I presume that the same motive influenced the Court, that the questions presented to us by the Treasurer and the claimant appeared to simply involve a dispute, first as to whether he was to be paid at all, and, if so, whether he was to be paid at the rate of nine hundred dollars a year or four hundred dollars a year. Those were the questions presented to us, and we decided that he should be paid out of the fund which was found there, set aside for that purpose, and it should be payable under the Acts of 1899, at the rate of four hundred a year, and not at the rate of nine hundred dollars a year. In other words, we held, as I understood it, that he was performing the duties prescribed by the Act of 1899, as well as the Act of 1897, and he should draw his compensation at the rate prescribed by the Act of 1899, which was the last expression of the legislative will, as we thought the Legislature had the right to reduce his salary.

Q. Ought not the Court to have required the Auditor to report to the Court the amount of the claim allowed by him before permitting a mandamus to issue against the Treasurer? A. It did not so appear to us. It is the ordinary duty of the Treasurer, in the absence of some specific reason, to pay warrants issued by the Auditor.

Q. Does the Associate Justice think it is the duty of the Clerk of the Supreme Court, in all cases, whether the amount in demand was undetermined or not, to issue a mandamus against the Auditor or Treasurer? A. I would not like to say that it was or was not his duty in all cases. That would depend upon the nature of the case, and also upon the provisions of the judgment of the Court. It would be the duty of the Clerk to obey the judgment of the Court, which issued such process, under such circumstances as the Court should direct. That judgment would necessarily be influenced, not only by the general principles of law, but by the application of those principles to the facts of the case. I do not know that any rule would apply to all cases.

Q. How many writs of mandamus have been issued by the Supreme Court since you have been on the bench? A. I do not recall. I know there have been several writs, perhaps not of mandamus. I remember in *Caldwell v. Wilson,* a writ of possession was issued, and I think in *Cunningham v. Sprinkle,* there was a mandamus issued, compelling the old Board to admit the appointees of the Legislature. There may be other instances that I do not recall.

Q. Does the record of the Supreme Court show that the judgment in this action has been satisfied? A. I do not know.

Q. Whose business is it to keep the record of the Court? A. The Clerk of the Court.

Mr. JARVIS: "We are through with the witness."

Cross-Examination.

By Mr. WATSON:

Q. Judge Douglas, do we understand you to say, or to claim, that the Court is any less responsible by advising the Clerk to issue that writ, a majority of the Court so advising, than it would be so if they expressly ordered him to issue it? A. The advice was simply to the effect that he was already directed to issue it.

Q. Will you please answer my question? You know the rule. A. I think they are less responsible, because they had no right to order him to issue it in express terms, without something being before them. I did not intend to shift any responsibility by declining to give the Clerk an official opinion. I did so simply because there was nothing before the Court on which I could officially act, and, therefore, all that I could give him was my private opinion of what was the legal effect of the opinion and judgment of the Court already rendered. If I was correct in supposing that that opinion and judgment authorized him to issue the writ, then the Court was responsible for the issuing of the writ when they delivered that opinion and judgment.

Q. Did you know at the time you gave your last advice, as you call it, that the Legislature, by resolution in June, was still claiming to hold control over the oyster fund? A. Your question assumes a fact. I may have seen in the paper something about the resolution, but there was nothing in what I saw to lead me to assume that that resolution was anything more than it purported to be—a resolution of enquiry.

Q. Had your attention not been directly called to it by the admitted dissenting opinion of Justice Clark, a copy of which was handed to you prior to that 16th of October? A. I think it had.

Q. Did you not know that there was considerable excitement over the matter here in town at the time you were dis-

cussing this question? A. I knew there was some talk. I did not know of any considerable excitement.

Q. Did you not know that the Governor had notified the Auditor and Treasurer not to pay that money unless the Court would issue such a writ as would put them in jail unless they would pay it? A. I have heard that since, and I may have heard it at the time. Judge Montgomery spoke of an interview he had had with the Treasurer, but the particulars of that interview I do not now recall.

Q. I ask you now, if you do not remember that that information was with the Court at the time that Colonel Kenan was trying to get an order for his protection? A. I do not remember that that was the fact. I will say, though, that I would have deemed it my duty, if that information had been before the Court, to have acted upon my convictions of the law.

Q. I ask you if before the 16th of October you did not read an interview of Col. J. C. L. Harris, in one of the morning papers, in which he alleged that the Court was trying to dodge, but that he was going to force it up to the issue? A. I don't think I did. I don't think I had heard it at the time of the last conference with Colonel Kenan on the 16th of October. Even if I had, I would not have felt that any action of mine should have been influenced by anything that I saw in the newspapers, but solely by matters before me officially.

Q. Did you hold, as a member of that Court, that the Supreme Court could compel the Treasurer to pay money on any sort of claim after the Legislature had forbidden them to do it? A. I have never held that. Your questions seem to include all claims against the State, whether—

Q. Here is my question. Do you claim that your Court could issue a peremptory mandamus against the State Treasurer, compelling him to pay out money, whether for salary or

otherwise, that the Legislature had refused to make appropriation for? A. I have never claimed that.

Q. Do you say that your Court has jurisdiction to compel the Trasurer to pay it where an appropriation has been once made and afterwards withdrawn? A. There might be circumstances under which the Cout would feel that they had the authority. If the Legislature should pass an act that the Governor's salary should not be paid, that would raise a very grave question.

Q. I ask you if it has not been the uniform decision of the Court, that even in that case they could have enforced it? A. I don't know that such a case has ever arisen.

Q. Have you ever found a case in this State, or in the United States, where the Courts have undertaken to put its hands in the treasury by writ of peremptory mandamus to pay claims, where the Legislature had forbidden its payment? A. I think there are cases.

Q. I ask you, Judge, if, under the decision of North Carolina, if our own Court has not decided that the Court can not compel the payment? A. I do not remember any such decision that goes to that extent. I want to say one thing, and I say it with all respect, that your question apparently assumes the fact that the Legislature had in expressed terms forbidden us to pay White. I don't admit that.

Q. I ask you if it is not a fact that if you had been advertent to the Act of 1898-9, when you went to pass upon the judgment of Judge Starbuck, you would not have known that the statement of facts agreed would be impossible to be true under that law? A. I don't think I would have known that fact. I certainly did not think so at the time.

Q. Do you not know that the very day that the facts agreed were signed that the law took the money out of the oyster fund and put it beyond your reach? A. I do not; but I wish to say that that act might well have been con-

strued into meaning the surplus after the expenses were paid, which was specially provided for by the act.

Q. Is that the construction? A. I am not in the habit of construing laws without an argument. The opinion of the Court speaks for itself.

Q. What is your opinion now as to whether that fund was not transferred to the school fund on the very day that the mandamus was signed?

Mr. F. H. BUSBEE: "I will ask permission to hand the witness the statute."

The PRESIDENT: "I will state that the witness is now in the hands of Mr. Watson."

A. I would really feel very great hesitation in construing a statute on the witness stand without any consideration. I don't recall the wording of the statute at present.

Mr. WATSON: "I will read you the statute of 1897, which is left intact by statute of 1899."

Mr. F. H. BUSBEE: "I ask permission to read the statute, and pass him the Acts of 1899, chapter 19. We have a right to read both the statutes to the witness."

The PRESIDENT: "I have stated once that the witness was under cross-examination."

Mr. COOK: "I don't object to the cross-examination, but I do object to this, and I think we have a right to do it. If you will refer to the statute you will see that the opinion was not written by itself, and you have no right to ask him to take that statute without perversion of the law. I think we have a right that this Court shall interpose so that the witness will not be at a disadvantage."

Mr. JARVIS: "In fairness won't you read section 9 of the Laws of 1899."

Mr. WATSON: "I read the Act of 1899, 15, 17 and 18.

Mr. F. H. BUSBEE: "Now read chapter 19."

The PRESIDENT: "You will please not interrupt the counsel, during the cross-examination."

Mr. WATSON: Q. Now, you say you found *Hoke v. Henderson* the law when you came on the bench? A. Yes; I so understood it.

Q. I want to read you from Hoke and Henderson:

(Reads quotation from *Hoke* v. *Henderson*).

Q. Is that good law? A. I presume it is. But of course you would have to take all parts of that opinion together to ascertain what it means. I don't think that any section of an opinion is the law except as construed together with all parts of the opinion and with the facts of that case.

Q. Suppose that appropriation had been made and withdrawn, did not you have to wait for the next Legislature to re-enact? A. That is a different question. If it was specifically withdrawn and covered in the treasury in express terms, I presume that that would make it a claim against the State. But if it was left as an appropriation payable to one man and not to another, and the only question was as to whom that appropriation was to be paid, it seems to me that that would be a judicial question. It seemed to us that that appropriation had never been specifically repealed, nor could we see anything saying in specific words that White could not be paid.

Q. You said that Judge Starbuck was mistaken; that that law was really in force. Is it not a fact that the Supreme Court held that Judge Starbuck was mistaken in holding that chapter 21 was void? A. The effect of the Supreme Court's decision was to reduce the salary and, therefore, to hold that as he was paid under the Act of 1899, that chapter 21 did not apply.

Q. After all that answer, have you answered the question, Judge? Judge Starbuck held that chapter 21 of the Act of 1899, that the provisions were unconstitutional, did he not? A. As well as I remember, he did.

Q. You held that they were constitutional, and that the meaning of that act was that the Legislature intended to pay

White? A. I don't think we passed upon constitutionality of chapter 21 at all.

Q. Didn't you read between the lines that White should be paid, and not his associates? A. I don't think we read anything between the lines.

Q. Did you not so interpret chapter 21 of that law? A. We decided that it did not apply to the facts as they existed.

Q. Didn't you so interpret it? A. No, we did not; we didn't pass upon that chapter.

Q. Didn't you interpret chapter 21 to mean that one-seventh of the money that was appropriated should be given to White? A. Was that the chapter that forbid the payment.

Q. Chapter 21 says: "The Treasurer of the State—"

Mr. JARVIS: "I ask the Court that the witness may have the book and read the chapters."

Mr. WATSON: I will not read all of it. I will read such parts of it as upon which I base my question. Chapter 21 says: "The Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shell-fish industry unless such person or persons are authorized to render such services under the provisions of the said act, entitled: 'To provide for the general supervision of the shell-fish industry of the State of North Carolina,' and ratified March 2, 1899." Didn't you so construe and interpret that act as to turn the money over to White? A. I will answer no, and then explain. I don't think that we interpreted that chapter at all. We paid him under the Act of 1899.

Q. Did you hold that it was not the purpose of the Legislature of 1899 to change the law so that Mr. White would go out of office? A. We presumed, of course, that was the intention of the Legislature, but when that purpose was unconstitutional, it was absolutely null and void, then it became

our duty to retain White in office and carry out the remainder of the intention of the Legislature as far as we could.

Q. After you went on the bench, did you resort to the doctrine of *in pari materia* until after the Legislature of 1897? A. I regarded that doctrine as essential to the determination of *Wood v. Bellamy.*

Q. Did you say one word about it in *Wood v. Bellamy?* A. I don't know that the name was called, but it depended upon construing all parts of the acts together. And, therefore, to my mind, it clearly came under the same doctrine.

Q. And so you hold that the doctrine of *in pari materia* applies to a construction of all statutes, as well as all statutes passed at the same session of the Legislature relating to the same subject. Now, I want to read you section 2 of chapter 19, Laws of 1899: "That George H. Hill of Washington, Beaufort County; B. D. Scarboro of Avon, Dare County; Daniel L. Roberts of New Bern, Craven County; Robert W. Wallace of Beaufort, Carteret County; C. C. Allen of Elizabeth City, Pasquotank County; J. M. Clayton of Englehard, Hyde County, and Daniel B. Hooker of Bayboro, Pamlico County, be, and the same are hereby declared Shell-fish Commissioners." Now, in placing a construction upon this act, you said that these men should not receive that money, but that Mr. White should receive the $400.00, did you not? A. I think that was the effect of the decision.

Q. Now, the law of 1897 provided that Mr. White should receive $900.00 a year, or $75.00 per month, payable monthly, did it not? A. I think so.

Q. That he should be entered into bond in the sum of $500.00? A. I don't remember those particulars.

Q. Then it permitted him to bond deputies in all of these counties to collect money, etc., did it not? A. I don't remember the particulars of the act.

Q. The Act of 1899 provided that all of these Commis-

sioners should not only be required to take an oath for the performance of that duty, but should each take a bond? A. I don't remember. I will say I don't wish to appear fractious at all, but when you have the book before you, and I do not recollect the exact words, I don't like to swear what the law was.

Mr. WATSON: I don't want you to, Judge. I would not for any consideration.

Q. Suppose the Act of 1899 should have said that the act of 1897, providing the salaries of Mr. White and his help, should be repealed, and the appropriations made for any such are hereby withdrawn, could you have issued the writ?

Mr. JARVIS: "One moment. I think we had better try the case before us, and not try a supposed case."

The PRESIDENT: "I think it is competent, considering the direct examination."

Q. I want to ask you, Judge, if the Legislature of 1899 could not have withdrawn all appropriations made in 1897? A. I presume so.

Q. Had they done so, you could not have issued a mandamus? A. I suppose not.

Q. Is a writ of peremptory mandamus an ordinary process? A. It was formerly a prerogative writ.

Q. I am asking you now is it ordinary or extra-ordinary writ? A. It depends on the meaning you put on the word "extra-ordinary."

Q. Did your Court ever issue one while you were on the bench? A. I think, as I have said before, that there have been one or two instances, perhaps, not for money demands. I think that the writ of mandamus was issued in the case of *Cunningham v. Sprinkle.*

Q. Did Col. Kenan ever issue a writ from your Court? A. I don't know.

Q. That was an action of *quo warranto,* was it not? A. Yes.

Q. This case of *Caldwell v. Wilson* was a *quo warranto,* was it not? A. Yes.

Q. And the Court issued an order to remove one man from office and put another in; that is right, is it not? A. I think it was a writ of possession, to put in the legitimate incumbent.

Q. Do you know any time in the history of the Supreme Court of North Carolina, from the beginning of the government to the present time, of a peremptory writ of mandamus to have ever been issued and served upon the State Treasurer? A. I think there are instances. I can not recall them at present. I think it was ordered, whether the writ was issued or not, the Reports did not show. I think it was ordered in the case of *Bailey v. Caldwell,* and in *Cotten v. Ellis.* Both of these cases were against the Governor.

Q. Have you ever mistaken the record in these cases? A. I think not.

Q. Don't you remember that in *Cotten v. Ellis* that it says it is not necessary to discuss the question of a writ? A. I think there is something of that nature; that the Governor only wanted the opinion of the Court.

Q. Don't you remember that in *Bailey v. Governor Caldwell* the members of the Court said there was no authority for issuing a writ against the Treasurer or State officer, because the Governor asked them to take jurisdiction and give their opinion on it? A. I am not aware of such judicial opinions.

Q. Now, do you know a case in twenty-five years where any court has issued a peremptory mandamus directing State Treasurer to pay a dollar of money? A. I am still under the impression that the writ was ordered in a number of cases.

Q. Can you give us any of those? A. I do not recall any others at the present time.

Q. I ask you if there are not numbers of cases on the

docket, and if they were not called to your attention, in which the Supreme Court has refused writs of mandamus to compel the Treasurer to pay money out of the Treasury? A. I think some were called to our attention.

Q. Has there ever been a case where a writ was issued to a Treasurer in the State to pay a salary out of the Treasury? You say there is a distinction betwen a salary and a claim? A. I was under the impression that such was the case in *Cotten v. Ellis.* Did you mean upon the Treasurer, or upon any State officer? I do not recall a case at present upon the Treasurer.

Q. Was the Constitution the same at the time that *Cotten v. Ellis* was decided as when you decided *White v. The Auditor?* A. There were some very material changes in 1868.

Q. Did not the convention change the Constitution so as to provide that no court should entertain a suit against the State; should have original jurisdiction to hear claims against the State, and that no process in the nature of execution should be issued upon the State? A. I don't think the Constitution contains any such language. I think there is something inserted that the judgment of the Supreme Court shall be merely recommendatory; but I don't think that article of the Constitution was intended to, nor does it, in words, apply to such case.

Mr. WATSON: The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action. Has not that been the uniform course of the Court until this claim was brought before you? A. I think that has been the uniform course in claims against the State.

Q. Has not that been the claim for public offices? Has it not so been held prior to this case? A. Not where there was an appropriation to pay, as far as I remember. I un-

derstand claims against the State to be such claims as would be enforceable between individuals, but which can not be enforced against the State, because no provision has been made for their payment. When provision was made for their payment, I see no season why mandamus should not be issued, requiring payment of claim.

Q. Now, I ask you if there are any cases where there were appropriations made to pay specific claims; have they ever refused peremptory mandamus? A. I am not aware; I can not recall any such now.

Q. Now, I ask you if all these courts here in the last ten years have not decided that a suit against the Auditor and Treasurer was in fact a suit against the State? A. I do not recall any such case to which you refer.

Q. I ask you if that was not called to your attention by the dissenting opinion? A. I do not admit that such is the case.

Q. You read the cases that were set out before you? A. I don't remember them.

Q. I mean at the time you read them; you examined his dissenting opinion and replied to it—the one that was filed? A. Do you mean *White v. Auditor,* or *Hill v. White?*

Q. Now, you filed a concurring opinion in *White v. Auditor.* In that you replied to Judge Clark's dissenting opinion. Did you read his opinion? A. Certainly, I tried to read all dissenting opinions.

Q. Now, didn't he cite to you and the Court not only decisions of our own Court, but decisions in the Courts of the United States, declaring that all cases against the Auditor and Treasurer upon a money demand were in fact actions against the State? A. I do not recall what cases he cited, but whatever they were, they did not make that impression upon my mind.

Q. Did you examine the case of *Bonner v. The Auditor and Treasurer?* A. I don't recall the facts of that case now.

At the time my examination was such as to convince me that the cases cited by Judge Clark did not sustain his contention. But I can not remember all the cases that have been cited to me in the last four years. If you will state your particular case I will answer.

Q. I am asking you if Judge Clark did not point you to the cases? A. I can not remember what cases he cited.

Q. But whatever he did cite, you saw the citations? A. Of course I saw the citations, but I don't remember them. They did not appear to me to sustain Judge Clark's opinion.

Q. Did you notice in reading this case agreed that was before you that the counsel on both sides seemed to agree pretty well as to the law? A. I think it was so stated by counsel that the object of the Treasurer and Auditor was simply to ascertain the construction of the Court upon the points in the case agreed.

Q. Did you notice that that case agreed came up from the county of Perquimans, instead of from the county of Wake? A. I may have noticed that fact at the time, but no question of venue was raised.

Q. Do you remember the case of *Johnston v. Board of Commissioners,* where our Court has been criticised in allowing the case to be tried in counties where they lived? A. I don't recall the case.

Q. Did you notice from the record in that case agreed, that case agreed was made up after Perquimans Court had passed, and that it was signed on the fourth and sworn to here in Raleigh by all the parties and sent off down to Perquimans to be heard, and it was heard in four or five days; did you notice that in the record? A. I do not.

Q. The dates would have shown, would it not? A. I don't remember the time when Perquimans Court was held. Of course I could have ascertained that fact, but it was not a fact that I was presumed to know, and did not investigate it. I do not think there was any such suggestion from any

member of the Court at the time. As I stated, I did not write the opinion.

Q. Did you notice any of the legislation in regard to the Shell-Fish Industry, as to whether any Legislature had attempted to appoint officers for a longer time? A. I don't think I investigated it.

Q. There has been legislation affecting this great industry? A. I presume there has been.

Q. The Legislature of 1897 put White in for four years. Was there anything to prevent the appointment of White, to have provided that that term of office should last ten years, instead of four? Could not they have appointed him for forty years? A. Perhaps they might; I don't know that I ever gave that matter any consideration.

Q. Since the amendment to the Constitution of 1875, if that be true, could not White be put in by that Legislature for forty years? Could not the Commissioner of Agriculture, under your decision of *White v. Auditor,* have been elected for forty years? Ain't that the effect of your decision in *White v. Auditor?* A. Perhaps that might be. In *Hoke v. Henderson* it held that Henderson had a life tenure.

Q. That was before the Constitution of 1875? A. Yes.

Q. We have very much enlarged the Constitution since that time? A. I think so. I think that the convention of 1875 struck out of the Constitution of 1868 a provision that the Legislature could not elect officers.

Q. Now, in *White v. Auditor,* if that decision be correct, and if Day's case be correct, and if Abbott's case be correct, could not the Legislature, this one, place a man in charge in the Agricultural Department for life? A. It seems to be the logical result of these decisions.

Q. Would not your construction be such that if this Legislature had seen proper, it could have elected officers to every place in the State, not provided for by the Constitution itself, and filled them for life, so that the succeeding Legislature

could have had no power to have changed it? A. I suppose that would be so. Of course the Legislature would have the power to abolish the office. I suppose if you kept the same office in existence, under the decision of *Hoke v. Henderson* the officer would be entitled to his vested term.

Q. The way you construe the Constitution and the interpretation that you put upon *Hoke v. Henderson,* Mr. White could not have been turned out for fifty years if that Legislature said so? A. I am simply saying that that would perhaps follow from that construction. No such case has ever come before us.

Q. In your opinion, could you get rid of them at all, except by impeachment? A. I don't know what would be the effect of a constitutional amendment. But that is merely an offhand opinion.

Q. Can a constitutional convention violate or destroy a right in the meaning and intent of the Constitution of the United States? A. Put in that way, I don't think it could.

Q. Was that not called to your attention as the effect of your decisions? A. No such effort has been made, and no such facts were before us; we did not contemplate the possibility of any such action.

Q. The Legislature of 1899 said that the next Legislature could not undo this? A. It did not say that; it said the officer should hold for four years.

Q. I want to ask you if that statute did not so say and so hold? A. Substantially they gave him a four years' term of office, which he was entitled to hold under the uniform decisions of this Court.

Q. And you held that he could certify a claim as Chairman of the Shell-Fish Commission when he was Chief Inspector of the Oyster Industry? A. I think the effect would be to show that he held the office.

Q. And you decided and directed that the Auditor should audit his claim when certified to by the Chairman of the

Shell-Fish Commission and endorsed by his Secretary? That is the substance of it? A. I presume that is so.

Q. The Act of 1899 provides that one of these men shall be Secretary?

Mr. COOK: "Well, didn't one die?'

Mr. WATSON: "I don't know."

A. I want to say that those papers never came before the Court, and were never seen by me.

Q. But you had provided that the money should be gotten out of the Treasury by a man who signed as secretary, and when countersigned by the chairman? A. Whatever we said in that opinion was said, of course, nor can we unsay it now, only I do not wish to swear to anything which I do not remember, and which may not be strictly true.

Q. You said you had a long term in 1899? A. I think we adjourned on the 14th day of June.

Q. Did you have any information of the meeting at Greensboro of Mr. Pritchard and Mr. Pearson and Mr. Linney, and that as soon as the Legislature adjourned there was to be an application to you for a mandamus? A. I did not. I think the Legislature adjourned the same day that we did.

Q. There was very great political excitement, was there not, at the time these opinions were written? A. I suppose there was.

Q. I ask you if you don't remember saying that but for the fact of your being needed by the Republicans on the bench here that you would be appointed to a United Statse Judgeship? A. I have never made any such statement.

Q. Did you not make it to Mr. E. J. Justice? A. I did not. I said that one reason given why I should not be appointed a District Judge, although recommended by the best men in North Carolina, was, that I was elected for an eight years' term upon the bench of North Carolina, and that it would not be fair for me to give up that position and turn

the Court over, or the appointment over, to a political opponent. But I have never said that was the reason. Of course when you don't want to give a man a place, you can find a great many reasons for not doing so.

Q. At the time you read that written opinion to Col. Kenan at the Yarboro House, Col. Harris called to see you, didn't he? A. I for get when it was. I was going up from the Yarboro House and Col. Harris came across the street, and he said he could not get his money. I suppose I said to him, "You will probably get your money," or words to that effect, and passed on. But I didn't express any opinion of my own or of the Court that that would be done, further than that off-hand expression. Of course, at that time the judgment of the Court had already been rendered, under which the mandamus was afterwards issued.

Q. I want to ask you this question: Do you hold as a Court that you can issue a mandamus against an officer of the State, in charge of the money of the State, to compel him to perform any duties, except a purely ministerial duty? A. I do not.

Q. Do you understand the law to mean that you can issue a peremptory mandamus for anything other than a simple ministerial duty? A. I think that the Court can issue a mandamus to the Auditor, compelling him to exercise his discretion where the matter is in his discretion.

Q. Suppose that was so, can you order him to use that discretion and issue a warrant, and in the same writ require the Treasurer to pay it, whether he has got anything to do more than the exercise of a simple duty; I mean the Auditor? A. As I said, I see no reason why we should not issue a mandamus, if the facts justify it, to the Auditor to exercise his discretion in passing upon any claim upon which an appropriation was made and was available, and at the same time command the Treasurer to pay such claim upon the warrant of the Auditor.

Q. Suppose a claim would be presented to your Court and its genuineness and its amount agreed upon, could you then issue a peremptory mandamus to the Auditor to allow it? A. Yes; if there was an appropriation available for that purpose If there was none, it would be his duty to inform the Court of that fact.

Q. Suppose the Auditor finds the amount due and there is no case pending in Court, what is his duty when there is no appropriation made to pay it? A. I presume that he could do nothing further.

Q. Do you mean under The Code? A. Yes; I was not alluding to The Code, because I was referring to the Judicial Department. It is his duty, if he finds that there is not a special appropriation, to report the claim to the next session of the General Assembly. I don't recall the statute; there is a statute something to that effect.

Q. Would it not be a discretionary judgment? A. I don't know, if the validity of the claim was admitted.

Q. Suppose it was not admitted, then it is his business to investigate it, is it not? A. Yes.

Q. And if he finds that it is due, then he has got to look to the statute law to see whether there has been a fund appropriated to pay it? A. Yes, I think so.

Q. Is that discretionary duty? A. Of course, there are some things he has to pass upon, for instance, whether the statute authorizes him to pay it or not.

Q. Suppose it has not been ascertained, is that discretionary? A. I presume that that would be then within his discretion.

Q. Has not our Supreme Court decided exactly contrary to that? A. I have just said I thought that would be discretionary. I think you can compel him to exercise that discretion. I mean that you can compel the Auditor to pass upon a claim, but that you can not compel him to allow it. I can not presume that the Court and the Auditor and Treas-

urer would be working together for any unlawful purpose. I presume, of course, that if the Auditor audited contrary to the law, and the Treasurer paid it contrary to the law, of course it would be an unlawful transaction.

Q. Can you issue a writ of mandamus to the Auditor, compelling him to audit an unascertained claim and order the Treasurer to pay it? A. I think you can issue a mandamus to the Auditor to audit, within his discretion, unascertained claims, and I don't see why you could not order the Treasurer to pay the warrant when issued.

Q. Is not that just what you did do in *White v. Auditor?* A. I think not. Your question assumes a fact that did not exist.

Q. Didn't you do that in the case of *White v. Auditor?* Didn't you in *White v. Auditor* decide that the Auditor should audit a claim that required the exercise of discretion, and in the same writ didn't you order the Treasurer, when so audited, to pay a warrant when issued upon him? A. Yes; I think that is the effect of the opinion. But the question had been submitted to us in a case agreed, asking us if they should pay it. In that case we laid down a principle, under which it should be audited; that is, we ascertained the amount of yearly compensation and the fact that it was payable out of that particular fund, leaving to the Auditor simply to pass upon the minor facts as to how long he had performed the services, and what were his expenses.

Q. The suit that White brought was for services from the 15th of March, 1899, to the 15th of November, 1899? A. I don't remember the dates.

Q. Judge Starbuck rendered a decision, giving him the salary? A. I don't recall those facts. I presume they are correct.

Q. There were no facts brought before you except what was agreed before Judge Starbuck? A. I think not.

Q. Didn't you render a decision that enabled White to

draw money from the Treasury up to the 1st of September, 1900? A. I don't remember to what time he drew salary.

Q. Without leaving the Auditor any discretion to follow your decree, going clear beyond the point where Judge Starbuck had decided the question? A. I don't remember the date, and I don't think the legal effect of the decision was to take away the Auditor's discretion.

Q. Were you authorized to do anything beyond the 20th of November, 1899? A. I can not say now what facts were presented.

Q. Did you not depend upon the case? A. I presumed in these two cases of *White v. Hill* and *White v. Auditor,* the effect of the decision of the Court was to hold that White would be entitled to the compensation attached to his office. That, I presumed, was the legal effect of those decisions.

Q. But could your mandamus go any further than the facts agreed? A. I don't think it could go beyond the facts agreed.

Q. What evidence did you have before you in May, 1900, or what evidence did you have before you in October, 1900, that there was any money in the Treasurer's hands belonging to that fund. The case agreed thought it ought only to pay White to November 30th, of the year before? A. I don't remember those facts. *"White v. Auditor,* 126 N. C., page 574, it is further agreed that no part of the compensation as provided in chapter 19, Public Laws 1899, has been paid to the persons therein named as Shell-Fish Commissioners, and that the State Treasurer has on hand of the oyster fund collected under the provisions of chapter 13, Laws 1897, and chapter 19, Laws 1899, an amount sufficient and available for the payment of such salary and travelling expenses as the plaintiff may be entitled to."

Re-Direct.

Mr. JARVIS: Judge, will you please read section 14 of

the Acts of 1897, then read section 9 of the Act of 1899, chapter 19? A. Section 14 reads as follows: "All monies in excess of five hundred dollars derived through the provisions of this act, and in the hands of the State Treasurer on the last day of November in each year, shall be transferred by him to the public school fund of the State."

Mr. JARVIS: Now read section 9, of chapter 19 of the Laws of 1899? A. "That the Treasurer of North Carolina shall keep the funds arising under this act or any other act relating to the oyster industry, or other shell-fish industry of the State separate and apart from the other public funds in his hands, and shall pay the expenses of carrying out this act, including the compensation allowed by the said Board to its agents, servants or employes from the said fund, upon the warrant of the Auditor, which warrant shall be issued by the Auditor upon the certificate of the Secretary of the said Board and countersigned by the Chairman of the Board of Shell-Fish Commissioners," etc.

Mr. JARVIS: Now say whether or not the effect of section 9, of the last chapter read is not to repeal section 14, of the Laws of 1897, or to modify or to subordinate it to it? A. I think that as chapter 19, of the Laws of 1899, was passed after chapter 13, of the Laws of 1897, that its provisions would prevail as far as they were constitutional and, therefore, would modify and supercede the Act of 1897.

Q. Would the effect of section 9 be to require the State Treasurer to keep that fund in hand? A. Yes; those are the words of the statute. That seems to be a direct repeal of section 14, of chapter 13, of the Laws of 1897.

Q. Requires the Treasurer to hold that to pay the expenses of the industry? A. Yes; so stated in the act.

Q. Under the decision in *Caldwell v. Wilson,* would it be competent for the Legislature to destroy the doctrine of *Hoke v. Henderson* as to future officers? A. I think so, undoubt-

edly. That was the decision of the Court, that where the term of office was held under conditions prescribed before the office became vested, that then the officer taking the office with those provisions was bound by them. The same provisions could have been made by the Constitutional Convention, or by amendment to the Constitution, acting prospectively as to all constitutional officers.

Q. So it is competent for the Legislative Department of the government to destroy this principle as to future officers? A. I think so, undoubtedly; and the fact that no such provision was made by either one of the many Constitutional Conventions that have been held is one of the reasons that induced me to adhere to the doctrine of Hoke and Henderson, as I stated in *Wilson v. Jordon.*

Q. In the mandamus cases, did the Supreme Court undertake to do anything more than affirm the judgment of Judge Starbuck upon facts there agreed? A. That is all that the Court undertook to do.

Q. Was there any attempt in the Supreme Court in this decision, in this judgment, in any order, to change the facts agreed in the case? A. None that I am aware of, in any shape or form.

Q. Mr. Watson asked you if you knew anything about a meeting at Greensboro, in which you were to be asked for an injunction. I will ask you if any Republican has ever talked to you about what would be your decision about such matters? A. The matter may have been incidentally mentioned, but has never been discussed, nor has any application been directed to me to issue an injunction. I may have heard incidentally of the meeting at Greensboro from the papers at the time, but I have not heard that arrangements were made there to apply to me for injunction of any kind.

Q. You were asked if you could recall any case where mandamus was issued against the State Treasurer. Will you please read the case I have just handed you? Read the

entire case, or read the heading of it? A. "*R. & A. A. L. R. R. Co. v. Jenkins, Treasurer,* 68 N. C., 502. Where an act of the legislative branch of the government directs an executive officer to do a specific act, which does not involve any official discretion, but is merely ministerial, as to enter a specific credit upon an account, and the officer refuses to do so, a mandamus will be ordered. The Court has power to compel the Public Treasurer to do only such an act as involves no official discretion, and as is required by an express command of the General Assembly."

Mr. WATSON: "Is that all?"

Mr. COOK: "You have cross-examined the witness?"

Mr. WATSON: Not about this. Now, Judge Douglas, is that a mandamus to take money out of the Treasury? A. I think it is practically to the same effect. It appears to be a mandamus to compel him to deliver the bonds to the State.

Q. Was that a ministerial act? A. Partly ministerial and partly discretionary.

Q. Don't the Courts show that it was a ministerial act? A. Yes.

Q. Was it anything in the world but a ministerial act, such as I asked you awhile ago? A. I think it was something more, because I think it said when certain conditions were complied with or not are facts that must be complied with by some one, either by the Court or the Auditor.

Q. Judge, don't the case of *Railroad v. Jenkins* refer to this very question and decide that it can never be done when the caes is not ministerial? A. I had overlooked that case when you asked me, and I would prefer to speak from the book, which will speak for itself.

Mr. WATSON: "*R. & A. A. L. R. R. Co. v. Jenkins, Treasurer,* 68 N. C., 502. Where an act of the legislative branch of the government directs an executive officer to do a specific act, which does not involve any official discretion, but

is merely ministerial, as to enter a specific credit upon an account, and the officer refuses to do so, a mandamus will be ordered. The Court has power to compel the Public Treasurer to do only such an act as involves no official discretion, and as is required by an express command of the General Assembly." A. In *Mabry v. Madison,* our doubt was, because of the fact, that there was not one specific act to be done; that is, to hand over the Chatham Railroad bonds, as to hand over "the commissions." This is the language of Chief Justice Pearson. That was then a ministerial act that was absolutely commanded by the General Assembly.

Q. Now, I ask you if the acts that have just been handed you by Governor Jarvis, if that is the case of taking money out of the Treasury? A. The head-note does not say money, but it says bonds. I did not read the facts in the case of *Railroad v. Jenkins.*

Q. It is where the Courts were compelling old man Jenkins, the President, to pass over these bonds, isn't it? That is the case he brings to you as an authority? Does that effect the case I submitted to you? A. Of course, I say, as I have not examined it, I can only take your question as stating facts. Of course, bonds are not money.

The PRESIDENT: "Are you through with the witness?"

Mr. WATSON: "That will do, Judge."

EXHIBIT "K."

IN THE SUPREME COURT—FEBRUARY TERM, 1897.

State, on Relation of Virgil S. Lusk and others,
against.
J. P. Sawyer, G. W. P. Harper, Jos. R. Love, Stephen A. White and P. L. Murphy.

BRIEF FOR DEFENDANTS.

The number of counsel employed in the cases of the two other asylums, and their full and able discussion of the principles in-

volved, render unnecessary such elaboration as the case would otherwise demand. We shall content ourselves with a statement of some of the points and pertinent cases, discussing more fully one or two propositions.

I.

The new statute an amendment or modification, not a repeal.

State v. Sutton, 100—474.
State v. Williams, 117—753.
Endlich on Construction of Statutes, 8, 490, 194.
State v. Baldwin, 45 Conn., 134.
Steamship Co. v. Joliffe, 2 Wall, 450.
Wright v. Oakley, 5 Met., 400, 406.
Forbes v. Board of Health, 27 Fla., 189 (26 Amer. St. Rep. 63).
Scaine v. Belville, 39 N. J. L., 526.
Middleton, N. J. & West Line R. Co., 26 N. J. Eq., 269, 273.
Fullerton v. Springs, 3 Wis., 588
Scheftels v. Tabert, 46 Wis., 439, 446.
Laude v. Chicago, etc., R. Co., 33 Wis., 640.
Glentz v. State, 38 Wis., 549.
State v. Gumber, 37 Wis., 298, 303.
Lisbon v. Clark, 18 N. H., 234.
Hancock v. District Township, 78 Iowa, 550.
United Hebrew Ben. Asso. v. Benshimol, 130 Mass., 327.

If the new statute re-enacts the old, without any change, it does not affect the old in anywise; if changes are made it modifies the old to that extent.

II.

The law abhors a vacancy, and only the plainest necessity will induce a construction which would enounce the doctrine that there was no institution or lawful authority at Morganton from 8th March to 7th April, the time of reorganization. A doubtful statute will be construed to avoid a vacancy.

Throup on Pub. Officers, 308.

These corporations are mere governmental agencies. They are called corporations, but behind this outer veil they are seen to be departments of the State.

Clodfelter v. State, 86—51.
Bain v. State, 86—49.

The law will look at the real nature of the institution. Calling it a corporation is a mere form. In *Beach v. Leahy*, 11 Kan., 2[illegible],

Mr. Justice Brewer, speaking of school districts, says: "The mere fact that these corporations are declared in the statute to be bodies corporate has little weight. We look behind the name to the thing named. Its character, its relations and its functions determine its position, and not the mere title under which it passes."

IV.

The analogy between these corporations and municipal corporations is strong, but they are not identical. They are more like counties, and may be called quasi-municipal corporations. But their directors are State officers, provided for by the Constitution, and can not be abolished while the office remains.

People v. McKee, 68—429.
People v. Johnson, 68—471.
People v. McGowan, 68—520.
People v. Bledsoe, 68—457.
29 L. R. A., 378, note.
1 Dillon, Mun. Corp., 40.

V.

This being so, the defendants have a property in their office, and it can not be taken away while the office remains.

Hoke v. Henderson, 4 Dev., 1.
King v. Hunter, 65—603.
Cotten v. Ellis, 7 Jones, 545.
Bailey v. Caldwell, 68—472.

But it is said that, in *Hoke v. Henderson* the office was a constitutional one, while these are statutory. There is no such principle in the case. It is said, the first thing in the syllabus, that the Legislature might destroy the office and, by consequence, the estate in it. Manifestly the Legislature could not destroy it, if it was fixed by the Constitution. The point of the case is, that Henderson had a property in his office, which could not be destroyed by the Legslature, while the office continued. In other words, the attempt to transfer it was uncontsitutional and void.

VI.

The purpose of the Legislature ,on its face, is to get the old officers out. No legitimate public policy is subserved by calling an old established institution Western Hospital instead of State Hospital, changing its official board from nine directors to nine "trustees," and its Superintendent into a 'President and Resident Physician." All the duties remain the same. The changes were all so trifling that there is no escape from declaring what everybody

knows, that the acts were intended to get rid of the officers, and nothing more.

The case of *Soon Hing v. Crowley*, 113 U. S., 703, relied on by plaintiffs, is broad enough to allow an inquiry here: "The rule is general, with reference to the enactments of all legislative bodies, that the courts can not inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrable from their operation, considered with reference to the condition of the country and existing legislation."

In the light of this rule, the purpose is manifest. A State department was efficiently officered, and well conducted. A change of political parties had taken place; and it was desired that all the old incumbents should give way to men of the dominant faith. All this may be inferred from the operation of the acts "considered with reference to the condition of the country and existing legislation."

It has been said that the meaning of the Legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the Legislature proceeded, from the end in view, or the purpose which was designed.

United States v. Freeman, 3 How., 556.

Where the meaning of a statute is doubtful, the reason and purpose of the act may be considered.

Smith v. Fiske, 23 Wall., 374.

We submit that the proper construction of the act will simply give it a prospective operation, change the name of the institution and of its officers, but leave all officers to serve out their time. The act is plainly a modification or amendment of the old law; and any unnecessary parts of it, such as the impossible requirement for organizing on the 9th of March (the day the nominations were sent in) must give way to the true state of the case.

If this rule is adopted, there is no animadversion on the Legislature. But if this can not be applied, there is no escape from the conclusion that the statute was merely intended to get rid of the present officers.

We do not mean to inquire into the private motives of the members, and to allege that they were not actuated by what they considered public motives. That is an inquiry into which we may not enter. But we do say that the purpose of this act, when viewed in connection with the history of the times, is to change the officers of the asylums.

In the construction of statutes the general state of opinion, pub-

lic, judicial and legislative, at the time of the enactment, may be considered.

Delaplane v. Crenshaw, 15 Gratt., 457.
Keyfort St. Co. v. Farm's Trans. Co., 3 C. E. Green, 13.
See note to U. S. v. Saunders, 22 U. S. Supreme Court Rep. (L. C. Ed.), 736.

VII.

When a new charter is given to a municipal corporation, it is the same corporation still as to rights and obligations, though the old charter is professedly repealed.

O'Conner v. Memphis, 6 Lea, 730.
Mobile v. Watson, 116 U. S., 289.
Broughton v. Pensacola, 93 U. S., 266.
Hughes v. School District, 72 Mo., 643.
Olney v. Harvey, 50 Ill., 453.
State v. Natal, 39 La. Ann., 439.
City of Maysville v. Schultz, 3 Dana (Ky.), 11.
Walnut Township v. Jordan, 38 Kan., 562.

"The name of an incorporated place may be changed, its boundaries enlarged or diminished, and its mode of government altered, and yet the corporation *not be dissolved, but in law remain the same.*"

Dill. Mun. Corp., 171 (115).

"Accordingly, the substitution of a new municipal charter in the place of a previous charter, or a change in such a charter, in whole or in part, where substantially the same territory and the same inhabitants are concerned, will not be presumed to be the creation of a new corporation, but the assumption by the old one of new powers and privileges. And where the rights of creditors are involved, the presumption is extremely strong that the identity of the two corporations continues, notwithstanding different powers are possessed by the new organization and different officers administer its affairs."

2 Dill. Mun. Corp., 172.

If this corporation remains the same, any attempt to divest the rights of the directors and superintendent to their offices must fail, because it would take the property of defendants without trial by a mere exercise of legislative will; and it would impair the obligation of the contract. In considering the impairment of contracts, care should be taken to avoid confusion from the many decisions of other States which hold that there is no contract right involved. Our rule is totally different.

In *Broughton v. Pensacola*, 93 U. S., 266 (10 Meyer's Fed. Dec., 864), there was a surrender of the charter and the cessation of corporate authority. The Court declined to consider the effect of an absolute repeal. "It is sufficient that here, in our judgment, there was a continuation of the corporation of Pensacola, with its original rights of property and obligations, not a new and distinct creation of corporate capacity and liability. * * * The inhibition of the Constitution, which preserves, against the interference of a State, the sacredness of contracts, applies to the liabilities of municipal corporations created by its permission; and although the repeal or modification of the charter of a corporation of that kind is not within the inhibition, yet it will not be admitted, where its legislation is susceptible of another construction, that the State has in this way sanctioned an evasion of, or escape from, liabilities, the creation of which it authorized. When, therefore, a new form is given to an old municipal corporation, or such a corporation is reorganized under a new charter, taking, in its new organization, the place of the old one, embracing substantially the same corporators and the same territory, it will be presumed that the Legislature intended a continued existence of the same corporation, although different powers are possessed under the new charter, and different officers administer its affairs. * * *

"The principle which applies to a State would seem to be applicable to cases of this kind. Obligations contracted by its agents continue against the State, whatever changes may take place in its constitution of government. 'The new government,' says Wheaton, 'succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government. It becomes entitled to the public domain and other property of the State, and is bound to pay its debts, previously contracted.' Inter. Law, 30. So a change in the charter of a municipal corporation, in whole or in part, by an amendment of its provisions, or the substitution of a new charter in place of the old one, should not be deemed, in the absence of express legislative declaration otherwise, to affect the identity of the corporation, or to relieve it from its previous liabilities."

The same reasoning applies in the case at bar. For under our State law the superintendents are under contract.

In *Mobile v. Watson*, 116 U. S., 289, 300, it is said: "Where the Legislature of a State has given a local community, living within designated boundaries, a municipal organization, and by a subsequent act or series of acts repeals its charter and dissolves the corporation, and incorporates substantially the same people as a municipal body, under a new name, for the same general purpose, and the great mass of the taxable property of the old corporation

is included within the limits of the new, and the property of the old corporation used for public purposes is transferred without consideration to the new corporation for the same public uses, the latter, notwithstanding a great reduction of its corporate limits, is the successor in law of the former, and liable for its debts."

In *O'Connor v. Memphis*, 6 Lea, 730: "Neither the repeal of the charter of a municipal corporation, nor a change of its name, nor an increase or diminution of its territory or population, nor a change in its mode of government, nor all of these combined, will destroy the identity, continuity, or succession of the corporation, if the people and territory reincorporated constitute an integral part of the corporation abolished. * * * The corporators and the territory are the essential constituents of the corporation, and its rights and liabilities naturally adhere to them."

"The reason is to be found in the peculiar nature of such corporations. A charter for municipal purposes is an investing of the people of a place with the local government thereof, constituting an *imperium in imperio*, and the corporators and territory are the essential elements, all else being mere incidents or forms." *Ib.*, 736.

"Confining ourselves for the present to these provisions of the act, the substance of what was done was, that the people and territory of the repealed corporation were at once reincorporated into a municipal corporation, and given possession of all the property of the old corporation for the same public use. The new corporation is identical with the old corporation in all its essential elements. A change in the form of government would be unimportant. Unless, therefore, there is something else in the charter to take the case out of the rule, rights and liabilities would remain as before." *Ib.*, 740.

"The Legislature and the Courts have settled the continuity of corporations by the transfer of their material parts—whether by identity or succession is practically immaterial—although the old charter may be expressly repealed and an entirely new charter granted. * * * In no case have the Courts ever failed to declare the identity, or succession, or continuity of the two corporations where the same corporators and the same corporate property have passed to the new corporation. The 'terms of the charter' have in such cases never been construed otherwise.

"In reference to municipal corporations, the rule, from the earliest times, has been that a change of name or function would not affect obligations.

Luttrell's case, 4 Rep., 87b.
Haddock's case, Raym., 439.

"Entirely new charters, upon a total cessation of user for years under an old charter, have been held to have no greater effect. *Colchester v. Leaber*, 3 Burr., 1866. 'Many corporations,' says Lord Mansfield, in this last case, 'for want of legal magistrates, have lost their activity, and obtained new charters, and yet it has never been disputed but that the new charters revive and give activity to the old corporation. Where the question has arisen upon any remarkable metamorphosis, it has *always been determined that they remain the same as to debts and rights.*"

City of Olney v. Harney, 50 Ill., 453: "It has merely changed its machinery of government and the titles of its officers, and is called a city instead of a town. But it is the same municipality. * * * But the municipal corporation that incurred the debt now sought to be recovered, still remains a municipal corporation, and to hold that it can set its creditors at defiance by procuring the Legislature to call it a city instead of a town, and its officers mayor and aldermen instead of president and trustees, would be such a burlesque upon justice that the proposition needs but to be stated to be rejected."

Trustees of Erie Academy v. City of Erie, 31 Pa. St., 515: "There is no doctrine better settled than that a change in the form of government of a community does not *ipso facto* abrogate existing law, either written or unwritten. This is true in regard to what is strictly municipal law, even when the change is by conquest. The act of Assembly converting the borough into a city did not, therefore, of itself, and in the absence of express provisions to that effect, either repeal former acts of Assembly relative to the borough, or annul existing ordinances. It was solely a change of the organic law for the future, and left unaffected the borough statutes, precisely as a change of a State Constitution leaves undisturbed all prior acts of Assembly. Were it not so, the new municipal organization would have been without law until," etc.

But it is said that these are cases of debts, and no case can be found where it is held that the old officers of the municipal corporation continued in office after a repeal and reincorporation. We reply that as to a county, *State v. Baldwin*, 45 Conn., 134, expressly so holds. Moreover, the North Carolina law, as to officers is different from that of most States. In the large majority of States, there is no contract between the officer and the public, as is the case here since *Hoke v. Henderson*. But where there is such a law as ours, the contract that A shall be mayor is as binding and inviolable as a contract to pay B money.

The substituting of a charter can not enable the real debtor, under whatever name, to evade his debt, nor can it enable the real contractor to avoid his contract under which a debt will accrue.

If the municipality is actually abolished, the office must go with it, of course; but no evasion will accomplish that purpose; and certainly no Court has ever held that a formal repeal and re-enactment in the same statute destroyed any rights, affected any contracts or displaced any officers.

The right as to debts grows out of the contract which the corporation has made. If, now, we follow the rule in this State, and say a contract as to this term of office has been made, no pretended repeal and instantaneous re-enactment can destroy the rights of an incumbent. If, in *Mills v. Milliams*, 11 Ired., 558, the Legislature, after repealing the act to establish the county of Polk, had re-enacted it, calling it the county of Polkberry, whose officers should be a manager instead of a clerk, and a bailiff instead of a sheriff, could anyone contend that there had been any repeal, and that the sheriff had been legislated out? The identical point is involved in *State v. Baldwin, supra.*

IX.

The superintendents are officers, both on account of the grave and important duties they have to perform—the fact that they are a lodgment of a portion of sovereignty, and that the act under which they were appointed expressly calls them officers. This latter reason alone is sufficient.

Brown v. Turner, 70—93.
See Eliason v. Coleman, 86—235.

X.

If the six old directors are still in office, there has been no appointment by the Governor to fill the three vacancies. For appointment of nine to fill the place of three, without designating anyone for any particular place, must be void for uncertainty. It is too plain for discussion.

XI.

If the old charter is not repealed, but amended or modified, do the three directors, whose terms expired March, 1897, hold over till the Legislature meets; or has the Governor the right to appoint? It is an important question and should be decided.

1. "All officers shall continue in their respective offices until their successors shall have been elected or appointed, and shall have been successors shall have been elected or appointed, and shall have been duly qualified." Code, sec. 1872.

2. The Governor has these powers and duties (Code, sec. 3320):

(1). He is to see that all offices are filled, and the duties thereof performed, or in defaul thereof, apply such remedy as the law allows, and if the remedy is imperfect, acquaint the General Assem-

bly therewith; (2) he is to make the appointments and supply the vacancies not otherwise provided for in all departments. It is apparent that the first sub-section does not apply. The offices are filled—there are incumbents to perform its duties. Nor does the second sub-section, we submit, now apply. True, it was the duty of the Governor to nominate to the Senate, which is the plan marked out in the old and the new act. But having failed to do this, the old members hold over under sec. 1872. There is technically no vacancy, because the office is filled by persons who will perform all its duties. The two statutes are made consistent by confining sec. 3320 to cases where there is no incumbent. The reason of the thing sustains this view: Suppose the Governor and Senate are at variance and the former, because of his inability to get the men confirmed whom he desires to appoint, will make no nomination, or makes nominations which he knows can not be confirmed; as soon as the Legislature adjourns he can appoint whom he pleases, and thus the statute would be made a dead letter,

Respectfully submitted.

R. O. BURTON,
F. I. OSBORNE,
For Defendants.

NORTH CAROLINA—In Supreme Court.

State of North Carolina on Relation of Z. V. Walser, Attorney-General, and Board of Trustees of the State Hospital for the Insane, at Goldsboro,

against

John F. Southerland et als., the Board of Directors and John F. Miller, Superintendent of the Eastern Hospital.

I. The defendants admit the power of the Legislature to repeal the charter, and thus to destroy the institution, and to abolish the office of Superintendent and Director, and thus put an end to their tenure.

II. The question then for the Court is to decide whether they have done this.

III. The defendants deny that the Legislature has the right or power to leave the offices in existence and transfer them from Jno. F. Miller and the Board of Directors, to Abner Alexander and the Board of Trustees named under the new act.

IV. It will, therefore, be important for the Court to consider whether the offices have been left in existence, and whether the Legislature has endeavored to transfer them to the plaintiffs.

V. To do this it will be necessary to consider the identity of the institution and of the offices.

Leaving out of consideration, for the present, the question of the act referring to "The Eastern Hospital" at all, let us see whether the act repealed the charters of the institutions mentioned therein as being repealed. The defendants contend that, although the act in section 1 says "the charters of said hospitals by whatever name, and all acts amendatory are hereby repealed," the effect of said act was not to repeal said charters; first, because it is apparent from the whole act that the repeal should not be general, but should at most, only apply to the name of the institutions and the officers.

Smith v. People, 47 N. Y., 330.

This was an act that provided that certain statutes are "hereby repealed," but the Court of Appeals held that it was apparent from the act itself and other legislation, that the repeal was not intended to be general. Presumption against unnecessary change of law.

Endlich Interpretation of Statutes, secs. 520-521.
Scranton School Dist. Appeal, 113 Pa. St., 176.
190-1 Cooley Const. Lim., p. 167, N. 3.

Second. Because the statute re-enacts substantially the acts it professes to repeal, which is rather a re-affirmance than a repeal of the former statutes.

The re-enactment by the Legislature of a law in the terms of a former law at the same time it repeals the former law, is not in contemplation of law a repeal, but it is a re-affirmance of the former law, whose provisions are thus continued without any diminution.

State v. Williams, 117 N. C., 733, cites Bishop Stat., Crim., sec. 181.
State v. Sutton, 100 N. C., 474.

Re-enactment, no repeal—Endlich Const. Lim., sec. 222, N. 46, sec. 112.

It seems to be the general understanding that the re-enactment of an earlier statute is a continuance, not a repeal even though the latter act expressly repeals the earlier. But even a repealing act re-enacting the provisions of the repealed statute in the same words is construed to continue them in force without intermission; the repealing and re-enacting provisions taking effect at the same time.

Fullerton v. Springs, 3 Wis., 667.
Lambe v. R. R. Co., 33 Id., 640.

So it was held that where an act repealing another, which provided for the appointment of certain officers, instantly by the second section re-enacted the repealed act, the repeal was rendered inoperative, the former law left in force, and the officers appointed under the same, whose term of office had not expired.

State v. Baldwin, 45 Conn., 134.

So the repeal of general corporation law by statute substantially re-enacting and extending its provisions does not terminate the existence of corporations formed under it, but is to be regarded as a continuance with modifications of the old law.

United Hebrew Ben. Ass. v. Benshimol, 130 Mass., at p. 327.
Steamship Co. v. Joliff, 2 Wall, 450.
Endlich Const., Lim., secs. 8, 490, 194.
U. S. v. Claflin, 97 U. S., 546.
Ogden v. Blackridge, Cr., 272.
Repeal and Re-enactment—Torrens v. Hammond 4, Hughes, 605 (13 N. Y., 212).
Dashiel v. Batto, 45 Mo., 624.
Patents for Cal. Land Claims, 12 Of. Atty.-Gen., 257, 7 N. M., 691.

See, also, as to identity of present corporations with those which existed prior to this act—

Brewer v. Duluth, 13 Fed. Rep., 334.
Laird v. City of De Soto., 22 Fed. Rep., 421.
Devereaux v. City of Brownsville, 29 Fed. Rep., 742.

In this last case, at p. 748, we find this language: "Now, here the population of the town of Brownsville, and all its accretions of individuals, from whatever source constituted the municipality known as the "town" or "city," or "board of Mayor and Alderman," of Brownsville, and these same persons now compose the municipality known as the "taxing district," or "Board of Commissioners," of Brownsville. So, at most, we have only a change of name and scarcely that," etc.

The act itself provides that the new institutions shall have all the powers, rights and privileges heretofore held by the old.

It being apparent that the effect of the legislation contained in this bill was not to repeal the charters, or destroy these institutions, but, at most, to change their names, and hardly that, with reference to the Eastern Hospital, let us see whether it has the effect to abolish the offices, and put an end to the tenure of the officers? It is true that section 5, of said bill, says: "That the office of Superintendent of the Eastern North Carolina Hospital,

North Carolina Insane Asylum, and the North Carolina Hospital for the Insane, are hereby abolished," but the same reasoning with reference to the repeal of a statute must be applicable to the abolishment of an office; and, if it can be seen from the bill that the office is not abolished, it is not abolished, even though the act expressly says that it is. It is true the name may have been changed to "president and resident physician" and the name of directors changed to trustees, but the offices have not been abolished.

The Legislature changed the name of the Board of Directors of the Institution for the Deaf, Dumb and the Blind to the "Board of Trustees," and in the *People Ex. Rel Nichols v. McKee*, 68, N. C., the Court say at p. 438: "We assume that the General Assembly had some sufficient reason for changing the name of the Board, but it left the Board, the office, to be filled by officers." Then again, at p. 434 the Court pertinently asks: "Can these institutions exist without directors?" This, though, the institution was then being governed by a "Board of Trustees," the Court evidently looking through the name to the functions and duties of the office, and recognizing in the Board of Trustees the same office as had existed under the name of Board of Directors, that is, they both had the same duties and functions.

We ask with equal significance can these institutions exist without Superintendents? The Court can readily see that the office of president and resident physician is the same office of that of Superintendent; that is, it has the same duties and functions; in fact, the act itself says so in direct terms.

The Constitution of New York provided, among other things, that all offices then existing should be filled by election by the people. At the time of the adoption of the Constitution there were "tax assessors." Subsequent to that time the Legislature provided for the appointment by the Governor, of "Tax Commissioners," whose duties were the same as "Tax Assessors," with other added duties. It was contended that this being the same office as "Tax Assessor," which existed at the adoption of the Constitution it should be filled by election by the people, and not by appointment by the Governor.

The Court of Appeals in *People v. Raymond*, 37 N. Y,. at pp. 428-9, says: "To determine whether the act in question is constitutional, * * it is necessary to determine whether the office, in substance, existed at the time of the adoption of the present Constitution. * * To determine the first question it is necessary to ascertain the functions and duties of the office in question (that is Tax Commissioner). * * It is necessary, also, to inquire whether the like functions were performed by any officers, at the

time of the adoption of the existing Constitution. * * * Again, p. 430: "Thus, it appears, that precisely the same essential functions were performed in making, equalizing, correcting and delivering the assessment rolls by the ward Assessors, at the time of the adoption of the Constitution, that were contemplated to be performed by the Commissioners of taxes and assessments by the act in question. That although the names of the officers and the mode of their appointment have been changed, the result to be accomplished by the one is identical with that of the other."

"But it is argued, on the part of the appellant that additional powers have been conferred, and additional duties imposed on the Commissioners. * * After enumerating the new duties, the Court continues: "Such additional facilities in the performance of the same duties, surely can not make them new offices * * in the sense of the Constitution. If they can thus be made new, the section of the Constitution above quoted may readily be made a nullity."

Applying the reasoning of this, one of the first courts of the world, to our case, it does seem that we must conclude that Superintendent, and President and Resident Physician, must be one and the same office. They have the same functions and duties, and the additional duties such as may be prescribed by the Board of Trustees, if it change the law at all, "surely can not make it a new office," and that it does not change the law is apparent from sections 2247 and 2254 of The Code, which empower the Directors to direct, manage and make by-laws for the institution, which may, and do prescribe such duties for the Superintendent as is thought advisable, not enumerated in The Code. If they can thus be made new, the ruling in *Hoke v. Henderson* and in all cases in our Supreme Court since that time, that an office can not be taken from one and given to another by Legislative action, "may readily be made a mere nullity."

It having been thus demonstrated that the charters of the hospitals have not been repealed, nor the institutions destroyed, nor the offices of Director and Superintendent abolished, the defendants contend that the Legislature did not have the right or power to transfer these offices to others, their terms not having expired.

In support of this contention, we need hardly cite any other authority than that of *Hoke v. Henderson*, 4 Dev. 1.

The office of Clerk of the County and Superior Court had been established by the law of 1806, and under said law Mr. Henderson had been appointed Clerk of said courts for Lincoln County, during good behaviour. The law of 1832 provided for filling these positions throughout the State by election by the people. Under

the provisions of this law Mr. Hoke was elected Clerk of said Courts for Lincoln County, and claimed the office of Mr. Henderson. The Court held that the Legislature had no right to thus transfer the office of Mr. Henderson to Mr. Hoke. The Court says at p. 7: "The act transfers the office of Clerk from one of these parties to the other, without any default of the former, or any judicial sentence of removal. The question is, whether this legislative intention, as ascertained, is valid and efficacious, as being within the powers of the Legislature in the constitutions of the country, or is null, as being contrary to and inconsistent with the provisions of those instruments." Again at p. 20: "He takes the office with the tacit understanding that the existence of the office depends on the public necessity for it; and that the Legislature is to judge of that." Again, at p. 21: "It may be competent to abolish an office; and true, that the property of the office is thereby, of necessity, lost. Yet it is quite a different proposition, that although the office be continued, the officer may be discharged at pleasure, and his office given to another." (Read balance of section.) Again, on p. 22: "For the term for which the law assures his office to him, he claims, and can claim to be the agent of the public to discharge the duties of that place, while there are duties to be discharged, and he is ready and willing to perform them." Again, at p. 26: "Nor do those powers, nor that of abolishing the office altogether, which are readily conceded to the Legislature, involve the further one of depriving the officer of his office while it continues." Again, on p. 30: "We think, as already stated, that they may, if it be merely the incidental consequence of a general law really passed for the purpose of abolishing useless offices, as a species of governmental institution. But that they can not, if offices are retained and the officer is deprived of his property therein, without default and without trial, for the single and sole purpose of giving it to another. Nothing is better settled than that an office is property; there is a contract between incumbent and the State; the State is pledged by its honor; it can not be impaired except by the consent of both parties; the emoluments may be increased or diminished; but this must be done in good faith and in fair dealing, and with no view to evade or directly or indirectly to impair the substance of the contract.

King v. Hunter, 65, 609.

It thus appearing that the charters have not been repealed, nor the offices abolished, and that the defendants can not be deprived of their offices, we might stop; but there are other points which we deem it our duty to present for the consideration of the Court.

By Chapter 507 of the Laws of 1891, the name of the institution

of which the defendants are in charge was changed to the "Eastern Hospital." Now, this name is nowhere alluded to in the Act under consideration, except in section 7, which provides for the meeting of the trustees to elect officers, such as may be needed. As no corporation can have but one name by grant.

A. & E. Cyclopædia, Vol. 15, p. 970.

And as where there are two, the last grant prevails.

Ibid, note 2. 1st Dillon on Cor., 117.

And as, where there is an irreconcilable conflict between different parts of the same Act, the last in order of position must control.

Am. & En. Cyclopædia, Vol. 23, p. 311.
Trustees v. McIver, 72-84.

And, whereas, "The Eastern Hospital," in section 7, is the last name in position given to defendant's hospital in said Act, it must prevail, and, even the name is not changed. Even if this were not so, no one could say with certainty what name was intended to be given to said hospital. Section 2 has "The State Hospital for Colored Insane, located near Goldboro." Section 3 has "State Hospital for the Colored Insane." Section 4 has "The Eastern Hospital for the Colored Insane," and "State Hospital for the Colored Insane." Section 5 has "The Eastern North Carolina Hospital." Section 7 has "The Eastern Hospital." And the Governor commissioned the plaintiffs as Trustees of "The State Hospital for the Insane at Goldsboro."

But, "mere changing of the name of a corporation is not the creation of a corporation in the sense of the Constitution, it is no more the creation of a corporation than the changing of the name of a natural person is the begetting of a natural person, and a change of name is not a change of being."

Field on Cor., sec. 24, p. 31.

Mere change of name by the Legislature does not affect the rights of third parties.

Rosenthal v. Madison, R. Co., 10 Ind. 359.

If, therefore, a change of name is of so little importance, it can not be that it can have the effect of depriving men of their contract rights guaranteed to them by the Federal Constitution.

Kent's Com., Vol. 1, p. 418.

Kent's Com., Vol. 1, p. 418: "All incorporeal hereditaments, immunities, dignities, offices and franchises, are rights deemed valuable in law, and whenever they are the subject of a contract or

grant, they are just as much within the reach of the Constitution as any other grant.

Dartmouth College v. Woodward, 4 Wheat. 69, Story, J.

The office is as much protected as a constitutional one *Hoke v. Henderson*, 4 Dev., p. 25. It is as much recognized in the Constitution.

Section 30 simply provided that no Clerk of Record should be of counsel of State—Const. 1776—office of Clerk Superior Court setablished in 1806.

Art. XI, sec. 10, of the present Constitution, provides for insane asylums, and there was one in existence then.

The election of Abner Alexander is void, because not held on the day appointed in the act.

Am. and E. Cyclopædia of Law, Vol. 6, pp. 218-20.

Time was never more essential than in this case, as, if the contention of plaintiff is correct, these institutions were left entirely without officers; as, where an office is abolished the incumbent does not hold over. Am. and Eng. Cy. of Law, Vol. 19, p. 562 q; *Buckman v. Commissioners*, 80-121, where it is held that the time when the Clerk shall offer his bond is essential. And Am. and Eng. Cy. of Law, Vol. 6, p. 320, where it is shown that the time of beginning the election of U. S. Senator is essential. See also *State v. Nichols*, 102, 465.

The plaintiffs must recover upon the strength of their own title.

Stanford v. Ellington, 117, 158.

The utmost that can be claimed for this act, if it is not utterly void, is that it has changed the name of the institution and Superintendent, and increased his salary from $2,000.00 to $2,500.00 per annum.

AYCOCK & DANIELS,
I. F. DORTCH.
ALLEN & DORTCH,
W. C. MUNROE,
Attorneys for Defendants.

The PRESIDENT: "Call your next witness."

Mr. OSBORNE: "The examination of Judge Montgomery will take some time sir—"

The PRESIDENT: "If I hear no objection, I will adjourn the Court until 10 o'clock to-morrow. I hear no objec-

tion. The Sergeant-at-Arms will adjourn the Court until 10 o'clock to-morrow morning."

The Sergeant-at-Arms makes due proclamation and the Court adjourns until to-morrow at 10 o'clock.

TENTH DAY.

THE SENATE CHAMBER,
Wednesday, March 20, 1901.

Court meets pursuant to adjournment at 10 o'clock a. m. and is called to order by the President.

The Sergeant-at-Arms makes due announcement of the convening of Court.

The roll is called, and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Wood and Woodard. Forty-seven.

Senator HENDERSON offers the following resolution:

"*Resolved*, That William M. Robbins, John B. Holman, S. W. Stevenson and A. D. Watts and J. H. Hoffman, character witnesses for the respondent, Chief Justice Furches, be allowed the usual mileage and per diem fees as witnesses in this action."

Senator HENDERSON: "I understand that under the rules, only two witnesses are allowed to prove. I think that five ought to be allowed to prove under the circumstances."

Senator LONDON: "I rise to inquire has this Court the right to do that, according to the Act of the General Assembly passed at this session in regard to the payment of witnesses in this trial. It is expressly provided that the witnesses of the respondents be paid, but no more than two to

prove any one fact. I submit, with all due respect for the opinion of the Senator from Rowan, has this Court the right to change an act of the General Assembly?"

The PRESIDENT: "I rather think the Court has the power. Here is section 2 of the act: 'That the above shall apply to witnesses for the respondents as well as for the prosecution: *Provided,* the respondents shall not be allowed pay for more than two witnesses to prove the same fact, unless permitted by the Court.' "

Senator JUSTICE: "I will ask now whether that rule allowing only two witnesses is against the law. I have never seen it apply to witnesses to prove character, as I remember. I am inclined to the opinion that these witnesses would be entitled to prove, unless the Court orders it otherwise. With such a number of witnesses, unless it was entirely too many, then the Court may choose who will be allowed to prove. I have never seen that rule applied to character witnesses."

Senator WOODARD: "I think the Senator from Rutherford is right as to their right to prove, if there should be no question raised about it. Where application is made for the payment of witnesses for the defense, then it is a matter to be passed upon by the Court."

Senator LONDON: "I have no objection whatever to the payment of these witnesses, and will with pleasure vote for the resolution. I was not advertent to the latter clause of that section."

The resolution is adopted.

The PRESIDENT: "There being no objection, the reading of the proceedings of yesterday will be dispensed with."

Mr. COOK: "We have been waiting for Gov. Jarvis. We will not ask that the Court be delayed any further. We ask that Mr. Justice Montgomery be sworn."

Mr. COOK: "Counsel for the Management request that you wait just for one moment, and allow the examination of a witness on our side to be suspended, that they may put

some witness on the stand whose convenience will be greatly subserved thereby."

Mr. POU: "We do not want to examine the witness other than to identify some papers which may become relevant later."

D. C. WHITEHURST, *witness called on behalf of the Managers, being duly sworn, testifies as follows:*

Examined.

By Mr. POU:

Q. Have you the papers, Mr. Whitehurst? A. Yes, sir.

(Witness produces papers.)

Q. What relation or connection are you to the late Mr. C. C. Allen, late Secretary of the Board of Shell-Fish Commissioners? A. I married his daughter.

Q. Is he living or dead? A. He is dead.

Q. What papers are those which you have in that bundle? A. These are the papers that came out of his desk.

Q. Where were these papers found? A. In the room he died in, in his desk.

Q. At what place? A. At his house in Elizabeth City.

Q. When did he die? A. Last October.

Q. Do you know the handwriting and signature of Mr. Allen? A. Yes.

Q. You have seen him write? A. There is his handwriting right there.

(Witness hands bundle of papers to counsel.)

Q. Look through the papers, and designate all those which you can testify are in his handwriting.

(Witness looks through papers.)

Q. In whose handwriting are these papers? A. Mr. Allen's.

Q. Which of these papers, if any, are signed with the proper signature of Mr. Allen, and which are written en-

tirely by him? A. There are the ones that has got his signature on them, and some of them are wrote by him, this pile here.

Q. The others were simply found in the papers of the Shell-Fish Commissioners? A. Yes, sir.

Mr. F. H. BUSBEE: "That is the very point about which we have previously cautioned our friends. We do not object to the proof that the papers were found in the desk of Mr. Allen, but we would be very far from admitting this witness to pass upon whether the papers are of the Shell-Fish Commissioner."

Mr. POU: Q. Where were they found; were there any labels on them—in what pigeon holes in the desk? A. They were in the pigeon holes of the desk, just folded up in the way he kept his papers, and where I knew he kept them.

Q. Kept what papers? A. His business papers. He had a special place for these papers, and kept them separate.

Q. Separate from his own private papers? A. Yes, sir.

Q. What papers were with these papers, kept separate? A. These were concerning his shell fishery.

Q. Do you know where he kept the papers relating to the Shell-Fish Commissioners?

Mr. JARVIS: "We object to any testimony from this witness about any Shell-Fish Commission."

Mr. POU: "He has testified to his own knowledge, he was a son-in-law of C. C. Allen, and has said he knows where he kept the shell-fish papers."

The PRESIDENT: "I think that is competent."

Mr. JARVIS: "There is no evidence here before this Court that Allen had anything to do with the Shell-Fish Commission. That he was Secretary of the Shell-Fish Commission has not been proven by the records."

Mr. POU: "It was proven by him without objection."

The PRESIDENT: "He has already testified to that without objection. There is the record evidence also."

Mr. POU: Q. You said you knew where Mr. Allen kept the shell-fish papers, or papers relating to that business? A. I did.

Q. Where did he keep them? A. In his desk.

Q. In what part of his desk? A. In the upper part, in the pigeon holes.

Q. Where did you find these papers? A. I found them in the same desk in the same room.

Q. Were they or were they not in the same pigeon hole? A. They were in the same place.

Mr. POU: "We ask the clerk to mark the papers which were written or signed by Mr. Allen, and to file the other papers."

Q. Do you know whether or not Mr. C. C. Allen, your father-in-law, was the man mentioned or associated on the Shell-Fish Commission by the Act of 1899? A. .....

Mr. JARVIS: "We object to any of this proof about Allen's official capacity. It must be proven by the record."

The PRESIDENT: "You would not have to prove that Gov. Aycock is Governor of North Carolina by the record; I think the same rule would apply here. They want to identify this man."

Q. Mr. JARVIS: "If this is all they want to do, we will not object."

A. "I know it just the same as I know the Governor, like the Court said."

Q. Were these papers found all together? A. Yes, sir. They were found just like I brought them up here, in the desk.

Q. In the same batch? A. Yes, sir.

Mr. POU: "Mr. President, Mr. Whitehurst desires a receipt for these papers. He is not a personal representative, and he desires that the Court give him some receipt for them, that would justify him taking them out of the papers of that estate."

The PRESIDENT: "The clerk will give you the receipt."

Mr. COOK: "We understand the counsel for the Managers to say that he had proved that C. C. Allen was Secretary of the Board. We did not so understand it. I do not think he will insist on that, if it comes up incidentally, after stating that he simply desired to identify some papers. Of course we do not intend to allow, or by silence to allow him to assume that we had waived any proof he was required to make. I think he asked this question, 'What relation were you to Mr. Allen, who was Secretary to the Shell-Fish Commission?' We have no objection to his saying that he was son-in-law to Mr. Allen, who was on the Board, but I do not think the counsel would insist on this, after the statement he made."

Mr. POU: "I do not want to take any advantage of the other side. If that question is objectionable, I am willing for it to be withdrawn. I will ask this question, if this was the C. C. Allen who purported to act as Secretary of the Shell-Fish Commissioner, and did act?"

Mr. COOK: "You are entitled to that answer."

A. Yes, sir.

Q. Was the C. C. Allen, among whose papers you found these, the man who acted, or attempted to act, as Secretary of the Board of Shell-Fish Commissioners? A. Yes, sir.

Q. Do you remember the date of his death? A. No sir, I do not exactly.

Q. About when was it? A. It was about the first of last October.

Mr. JARVIS: "You will allow us to examine these papers before you offer them?"

Mr. POU: "Yes."

Mr. JARVIS: "Possibly we may not object to them."

Stand aside.

Associate Justice MONTGOMERY, *a witness called in behalf of the respondents, being duly sworn, testifies as follows:*

Examined.

By Mr. Cook:

Q. How long were you a practicing attorney before you were elevated to the bench? A. I was licensed in January, 1867, and practiced law continuously up to 1894, when I was elected Judge.

Q. When did you take your seat on the Supreme Court bench? A. On the 14th day of January, 1895.

Q. Which was the first one of what is termed the office-holding cases to go to the Supreme Court after you were on the bench? A. *Wood v. Bellamy,* 10th Volume of the Reports.

Q. What did you understand was the principle involved in that case and which governed you in the decision arrived at? A. That an office was public property in North Carolina, and the opinion was based upon *Hoke v. Henderson* and *Cotten v. Ellis,* and others.

Q. There were a number of office-holding cases commencing with *Wood v. Bellamy,* and coming down to some which have been rendered during the last term of the Supreme Court? A. Yes.

Q. Well, now, coming down to Day's case? A. The same principle, except that the Legislature undertook to delegate the powers of chief officer to three persons instead of one.

Q. Was there any other extension of the doctrine after that, and if so, to what class of cases, and when was it first discovered to the opinion of the Court? A. In the cases involving the solicitors and clerkships of some Western Criminal Courts, where the doctrine of *in pari materia* was brought into use.

Q. In the cases up to Day's case, how were they decided with reference to the Court? A. With perfect unanimity.

And I will say and ought to say that I was the Judge on the bench who stood out longer before we arrived at a conclusion, because privately I thought that under the American system of government, an office ought to be a public agency, and ought to be dispensed with whenever the public said so through the Legislature. But the other Judges took the other position, especially Judge Clark, and he influenced me more in coming to my conclusion than anything else.

Q. That was where the first principal fight was made in conference for the continuation of that doctrine? A. Yes, sir.

Q. And you say that it was some time before you reached a conclusion concurring with the majority upon it? A. Yes, sir. In conference, I mean.

Q. After it was settled in *Wood v. Bellamy* that you would still recognize the doctrine laid down in *Hoke v. Henderson,* was it followed up to Day's case with unanimity? A. Yes, sir.

Mr. WATSON: "I object to his asking these leading questions"

The PRESIDENT: "We will observe the rules."

Mr. COOK: "The absolute utility of the question was the cause of my lapse."

Q. What was the first dissenting opinion filed against that doctrine? A. I think in Day's case.

Q. When was Day's case determined? A. In the 134th Volume of the Reports, I think in 1899.

Q. Do you remember the year? A. 1899, I think.

Q. When did Judge Douglas come upon the bench? A. I think in 1897.

Q. Who was associated with you upon the bench from January, 1895 to '98? A. Judge Avery, added to the others.

Q. You say Judge Avery was on the bench, and before he was displaced by Associate Justice Douglas that the opinions upon that point were unanimous. A. Yes, sir.

Q. In the conference among the Judges, was there or not a full and true discussion of all these cases? A. Very full.

Q. How has it been in respect to these office-holding cases? A. More care and more attention than any line of cases ever brought before the Court.

Q. In the construction of these cases in your association with the respondents upon the Bench, I ask you this question—have you ever discovered in them, even to the smallest extent, a disposition to be influenced by any other consideration than to ascertain and declare the law in the case honestly and conscientiously? And if so, what consideration?

Mr. WATSON: "There is a proposition laid down by the counsel that I suppose he wants an answer to, that the witness will have to say yes or no."

Mr. C. M. BUSBEE: "It is objectionable."

The PRESIDENT: "It is leading. I sustain the objection."

Q. I ask you this question, in your association with the respondents upon that Bench, I desire for you to state if you ever discovered the motive that influenced and controlled them in reaching a conclusion upon any of these cases?

Mr. C. M. BUSBEE: "We object to that. The objection is this, that he asks the witness upon the stand what was the motive of somebody else, governing an action of that other somebody, in respect to a decision."

Mr. WATSON: "That is what I understand this Court is organized to determine."

The PRESIDENT: 'I think it is objectionable for this reason. He might state what was said and done by the Court."

Mr. F. H. BUSBEE: "The question we desire to ask is not the motive influencing the Justices. Our question is what motive was manifested by the Justices by words and actions. Our question is as to the manifestation of any motive."

The PRESIDENT: "Let us have the words and actions then."

Mr. COOK: "State what words and actions, if any, on the part of these Judges in conference with you or otherwise in relation to their official conduct, discovered any purpose save the desire to decide these cases according to the law as it was presented?"

Mr. C. M. BUSBEE: "We object. This is a question as to whether or not this witness discovered any purpose, and it is objectionable. That is a pure question of opinion on the part of this witness, and that is what this Court is organized to determine."

The PRESIDENT: "I think the latter part of the question would be improper."

Mr. COOK: Q. I ask you this. State what purpose the words and acts of the Judges in conference with you discovered?

Mr. C. M. BUSBEE: "That is precisely the question. It is simply an abbreviated edition."

The PRESIDENT: "I have ruled on that."

Mr. COOK: I change it. What were the acts and conduct of these Judges?

Mr. C. M. BUSBEE: "We object to anything beyond what they said and what they did. You have the conduct—that is what we do not want. It is inadmissible."

Objection overruled.

A. In the construction and discussion of these cases, I unhesitatingly say, around the counsel board and elsewhere, so far as I know, the respondents approached them with painstaking and diligent research of the authorities cited by counsel, all around, and examined the books of all the authorities, nearly, cited, and with never a word reflecting upon the Legislature; with never a word except strictly pertaining to the arrival at a conclusion based upon the law and justice. I do not mean to say that these Judges were

not sometimes personally out of temper at remarks made by some of the others, but upon the public questions involved in these cases they made diligent, laborious search, men trying to get at the bottom of the truth, and to do right.

Mr. WATSON: "We object to that. It is absolutely incompetent for him to say what they were trying to do. I insist upon that."

Mr. OSBORNE: "We are not going to quarrel about that."

Mr. C. M. BUSBEE: "We want it stricken out."

Mr. F. H. BUSBEE: "Mr. President, we think that the answer is in response to the question, and it ought to remain. The witness has not testified as to the actual motive of the respondents, but he has testified as to their apparent conduct in the investigation, and their mind and conscience is evidence by their declarations."

The PRESIDENT: "I think I will let it stay in."

Mr. COOK: Q. In the first case in which White's interests were adjudicated by the Court, known as *White v. Hill,* what did the Supreme Court determine? What was the judgment of the Court in that case? A. The judgment of the Court was a modified confirmation of Judge Starbuck. In the original case that White was entitled to the office that he had been elected to by the Acts of 1897, of the Governor's appointment under the Act of '97, and the distribution of power to the new incoming officers was void; *Hoke v. Henderson* in the same case.

Q. Who concurred in that opinion? A. All of us except Judge Clark.

Q. In the next case, of *White v. The Auditor,* who concurred in the judgment of the Court there? A. Well, the respondents, and Judge Faircloth, Chief Justice.

Q. Who filed the dissenting opinions? A. Judge Clark did and I did.

Q. Were they upon the same grounds? A. Not at all.

Q. Upon what grounds was your dissenting opinion? A.

That the power to draw the money from the Treasury was not given under the act. It was there, appropriated, but I saw no way to get it out.

Q. That was an objection to the method or machinery that was provided in the act? A. Yes, and I did not want to broach a question involving a possible conflict between the two departments of the Government, when there was right before me a point I could decide without bringing about that position, and as a Judge, I chose to follow that course.

Q. What point was that? A. The point that the requirement that the Secretary of the new Board should make the auditing of the salary of the chief officer to be countersigned by the Superintendent himself, when the Act of '97 did not furnish that officer, did not enable any person to draw the money out of the Treasury, though it was there. There was no means of getting it out.

Q. Did you put it upon the ground that the Supreme Court did not have the power to issue a mandamus if the machinery had been there? A. I did not discuss that nor decide it on that ground, and the opinion speaks for itself.

Q. Will you please state what occurred after that in respect to the issuance of a writ or the order—your recollection of what occurred? A. Well, I will do so. It is all unpleasant to me. On the day when the dissenting opinion in the original case of White and Hill was filed by Judge Clark, or the next day, I think it was the very day, the 22nd of May last year, in *White v. The Auditor*—I was going home about dark, and overtook Gov. Russell and Mr. Worth, the Treasurer. I joined them, and pretty soon—I did not open the discussion, and I do not know which one of the other two gentlemen did, but we soon got upon the question of the dissenting opinion of Judge Clark. Mr. Worth told me that Judge Clark had just left his office, and that he had threatened him, and brought every influence to bear on him to prevent him from paying out that money, and

he said, "If you do it, you will be impeached, and your bond will be responsible, and there will be three vacant judgeships over there in the Supreme Court when the Legislature meets in June." This conversation was in the latter part of May. I remember particularly, because I knew the relations between Judge Clark and Mr. Worth; they were intimate friends and often consulted together. Both had told me so. I said, "Did Judge Clark volunteer that statement to you, or did you send for him?" He said: "I did not send for him; he came of his own accord, and told me all that." I said to him, "Well, did you ever hear of such as that?" He said, "Never." I said, "What are you going to do, listen to him or follow the Supreme Court?" He said, "I am going to follow the Court, and obey its mandates." That was in May, four months before this mandamus proceeding came up. I think I spoke of that conduct of Judge Clark as unbecoming, and these respondents may have heard it, but I do not remember whether I told them or not, until an interview which I am going to come to hereafter. In October some time, Mr. Harris, counsel for the plaintiff, came in and made some motion before the Court early in the morning, just as soon as the Court was open. As soon as I discovered that it was something about this case, I became interested, and said myself, "Why do not you go before the Clerk of the Court and see if he will issue that process, and if he does not, why later you can move." A few days after that, Col. Kenan had a demand on him, so he told me, from Mr. Harris, to issue this writ. And I said to him so far as I was concerned, if that question came before me on the bench before the open Court, you will hear from me officially. The Colonel came into the Court room twice about the matter. The first time I am not clear as to what took place, but I do know that all the time Judge Furches spoke out positively and pointedly, "Issue it; the judgment justifies it, and it is your duty." Judge Douglas

said pointedly both times that the writ ought to be issued, and Col. Kenan thought so too, in my opinion. Now the second time he came in I do remember, because important things happened. He said he was not satisfied with the interview of the day preceding that, and he wanted the advice of the members of the Court. And the three Judges spoke out positively, that he ought to issue the writ. I said, "Colonel, do not issue it. You know my dissenting opinion, and that is where I stand. I did not wish to be dragged into this thing," I, of course, meant that my record was perfectly clear in the matter, by my dissenting opinion, and that whatever I did about the matter should be from the open bench, and not anywhere else. Judge Clark then desired to have what we call a protest, which he had filed with the clerk, to be spread upon the reports of that term. Judge Furches said, the first man, "I cannot allow that. There is nothing here before the Court. There is no motion here—we are simply in conference, and Col. Kenan just wants our individual advice as to what he shall do in the premises, and I can not let that go in the book. You have had your dissent in the case of *White v. The Auditor* filed in the last volume of the Reports, and you ought to be satisfied with that." The other Judges took the same stand, and when it came to me to speak, I said to him, "Judge Clark, the time has come when I am bound to speak. Your dissenting opinions in relation to office-holding cases have been so full of appeals to the people, so full of political learning that I cannot hear to it. I shall never consent for that paper to be incorporated in the volume of the Supreme Court Reports, where there is no motion, and no case pending—I will never consent to it." I said to him, "Judge Clark, you have been at the bottom of all the trouble the Court has ever had along this line. These newspaper attacks, they come from you, and I know it." I repeated to him every word that I have told you here as to the conversation between me and Mr.

Worth. He admitted it, except he said Mr. Worth had sent for him. And I said, Mr. Worth had told me to the contrary, and I was particular to ask him about the matter.

Q. What was done with the paper he presented as a protest. A. He said, "If you all will not permit me to put my papers on record, please return them to me." And I, with my mercurial temperament, responded, and threw mine to him, and he took it. Judge Furches said, "There is too much said about this matter. I do not know what will come on hereafter, and I believe I will keep mine."

Q. Was there any objection ever made to Judge Clark, or any other Judge of that bench, filing dissenting opinions in any case or motion that was made in that Court? A. I think not. Never heard of such a thing. Great liberality was allowed in it. Sometimes we would wait weeks to allow a dissenting Judge to put it on.

Q. As a member of that Court, was it your opinion that if a majority of the Court had directed a writ of mandamus to issue on their judgment, it being the judgment of the Court, that it would be the duty of the clerk to issue it? A. I never intended to say that until that case was brought before me on the open bench; that was the point I was making around the consultation board, that when I decided the matter that case should be upon the motion of the plaintiff to force the clerk to issue that mandamus. If I had been on the bench when that motion was made properly, and the plaintiff had requested the writ in conformity to that judgment, I should have written an opinion to the effect that while I dissented in the first instance, and still thought the writ——

Mr. WATSON: "I do not know just what the Judge is stating—what he should have done."

The PRESIDENT: "Go ahead."

The WITNESS: I should have said, "My dissenting opinion will forever speak my views on this question, but the Supreme Court of North Carolina is the final arbiter to pass

upon conflicts between legislative enactments and the Constitution, and three Judges out of five constitute a majority. And notwithstanding what I personally think about this matter, the plaintiff's rights must be subserved, and he must have his writ." That is what I should have done, and I could not do less.

Cross-Examination.

By Mr. WATSON:

Q. You were examined before the House, were you not? A. Yes, sir.

Q. Did you take your examination after it was written out, and take it off and revise it? A. I did, because there was a lot of foolishness in it, jumbled-up questions and answers jumbled up. I showed it to both Judge Allen and Judge Connor, and they said, "you are right. Correct it." It was jumbled up and confused, and none of us could make anything out of it.

Q. You did take it to get it in proper shape, and returned it to them? A. That is right.

Q. And in that shape it was printed? A. That is right.

Q. And the printed copy over here in evidence is the corrected copy? A. Yes, sir. That is exactly right.

Q. Did you answer to all the questions put? A. I answered every one that they put to me, which I was sworn to do. The oath was, "In this investigation you will answer such questions as this Committee shall put to you," and that is the oath I took.

Q. Did you talk to Col. Kenan any about issuing this writ, prior to the time Mr. Harris came in and made the motion? A. Prior to that time, I do not think I did.

Q. Had not you been into the office and advised him to issue the writ before the motion was made? A. No, sir.

Q. Did you talk to him about it? A. I do not think I

ever said a word to him about it until Mr. Harris made the motion.

Q. Do you know whether he was advised not to issue the writ without a majority of the Court signing an order to that effect? A. I do not now recall any such matter.

Q. This testimony of yours before the Committee, you were sworn? A. Yes, sir.

Q. They asked you to tell all that you knew about the matter? A. No, I was to answer such questions as the Committee might put to me. You can very readily see why there are some things I have said here that I did not say there. But they are true, and never will be contradicted by mortal man. I do not think so.

Q. You wrote some opinions yourself in which you used pretty strong language about the General Assembly, did you not? A. Never.

Q. In which you were sarcastic? A. Never. And I pride myself that during all those years of scrambling for public offices, which was disgraceful, that my opinions were written like a lawyer and a judge all the time.

Q. In some of your concurring opinions, you dissented from the language of the respondents here, and the majority of the Court, of the writer of the opinion in the case, because the tendency was to reflect upon the Legislature? A. I wish you would hand me the case which you refer to.

Q. I ask you if you remember any such case? A. I remember my concurring opinion, and I stand by it now. And I say it was complimentary to the Legislature, and not derogatory. I will say that language, when you consider what Judge Furches said in his opinion, was proper in me. And I never intended to pass upon the motives of the General Assembly. That was not my business. I was a pure judge of law, and I had no idea of going into the motive, whether it was good or bad.

Q. And in Beddingfield's case you spoke of the language

of Judge Furches as being improper? A. In recalling the case now, I did not say it was improper, but I said it was making excuses for the conduct of the General Assembly, which I never intended to make. I will treat the acts of the Legislature as cold law, coming to me. I will not go behind their acts, and say what they meant.

Q. You concurred in the case of *White v. Hill?* A. Yes, sir.

Q. In that opinion, did the Court undertake to interpret what the Legislature meant by its various acts of '99? A. I answer that question in this way: The Legislature undertook to take from one man an office which he held under proper appointment, and to give it to others, and the Legislature had not the power, under the Constitution, to do that. Their motives I did not pass upon.

Q. The majority of your Court held that the duties were the same, and that it was the same office, did they not? A. Yes, sir.

Q. And that the effort of the Legislature was to change the mode of the Shell-Fish Industry, and put it under seven appointed officers instead of one man? A. I could not say that of myself, and I will not answer it unless the President requests me to do so.

Q. That was the effect of the decision of the Court? A. That is right.

Q. You say that you got in hot words over there at the Court. Was there any bitternes or bad feeling or bad blood shown in the consultation room prior to that time when you used this language to Judge Clark? A. I think that there might have been some ascerbity of expression sometimes between five gentlemen who have been for years and years around the consultation board together.

Q. These political questions came thick and fast after 1899? A. Yes, sir.

Q. Until you were very tired of them? A. Very, very.

Q. And you spoke of them as political cases? A. No.

Q. Did not you speak of them as political cases in that controversy that day in the conference you have just given, where you had this conference with Judge Clark? A. I do not think I called them political cases. I characterized his dissenting opinion as political, and I am prepared to prove it.

Q. You are prepared to prove that there was politics on his part, and not on the part of the majority of the Court? A. I did not discover it on their side.

Q. You did not see it on your side? A. I had no such. I looked upon the whole thing as an outrageous proceeding, and something the people of North Carolina would one day be ashamed of, this scuffle for office.

Q. I ask you, Judge, if, when these cases commenced piling in on you, if it did not get to the point where the Court was in conference, that it had about resolved itself into a political brawl? A. I will not answer that question unless the President requires it. When the Supreme Court of the State is called a brawling establishment I will not answer it unless I am required to do it. I consider it a high offense.

Q. Have you not been engaged a very great portion of your time for the past three or four terms of the Supreme Court in passing upon these political questions? A. Yes, sir.

Q. In which there was much acrimonious feeling among the Judges? A. On the occasion I spoke of.

Q. Before that? A. Not acrimonious and bitter. Oftener than otherwise the discussions were purely legal, and nobody could find exceptions to them. Except when these dissenting opinions were filed by Judge Clark.

Q. This was for two years before these impeachment proceedings—he commenced filing these opinions in the spring of 1899? A. Yes, sir. He commenced filing them two years ago, but he pointedly called attention to the impeachment proceedings in two of his latest.

Q. Did he not file before a dissenting opinion that you characterized in your concurring opinion as a dissenting opinion of great power and ability? A. I did. I would like to explain that. As I said just now, Judge Clark influenced me in *Wood v. Bellamy.* His opinions were strong then for the doctrine, as they were in *Ward v. Elizabeth City,* strong in the doctrine that an office was property. In Beddingfield and Day cases, he took the other tack, and went against *Hoke* and *Henderson,* and the power of this opinion is strong today, and that is what convinced me. One day I told him, "Judge Clark, the uncertainty of your course is this, that you got the Court into the doctrine of *Hoke v. Henderosn,* in the beginning, and instead of coming out openly and clearly in your recent opinion and saying you were mistaken in that doctrine, and trying to carry the Court back to that principle, you have not said so directly, but you have make attacks on the doctrine which were strong and forceful."

Q. Do not you call that when you were talking to your associate Judge, a kind of quarrel? A. That was half way between my house and his.

Q. You were sorter quarreling along the road? A. No.

Q. Do not you call that a sort of quarrel? A. I do not know what we called it, but we kept on in our relations to each other.

Q. You say Judge Clark's opinions were so powerful—he backed them with powerful authorities? A. I said his covert attacks in Beddingfield and Day cases on the doctrine that an office is property were so strong and powerful.

Q. You call that a covert attack? A. Yes, sir.

Q. It was printed in the books? A. Yes, sir. He did not repudiate the doctrine, but he attacked it invidiously.

Q. Did not he express in *Wood v. Bellamy,* his doubts? A. In *Wood v. Bellamy* he influenced my judgment in that opinion, and in *Ward v. Elizabeth City* he expressed himself

stronger against the doctrine of *Hoke v. Henderson* than I ever could, and he said that was the law in North Carolina, and in the other forty-three States the doctrine was otherwise.

Q. Did not he use the expression in *Ward v. Elizabeth City* that "If the doctrine is not law"? A. I do not know. He said it was good law in the same opinion, and that it was the law in North Carolina.

Q. Did not he question it by using the words "If it is good?" A. I think not. If he did, he drowned that in his deluge of argument the other way.

Q. When was the case of *Caldwell v. Wilson* decided? A. I think that was decided in '99.

Q. Was that decided before or after *Ward v. Elizabeth City?* A. After.

Q. Associate Justice Douglas has the doctrine of *Hoke v. Henderson* pretty clearly in that case? A. I do not know.

Q. Is that not the case where he called the attention of the Court and of the profession to the fact of the great number of decisions that repudiated the doctrine of *Hoke v. Henderson* in the United States Courts, and the number of States that had declared it to be unsound. A. He may have done so—I do not say he did not—I do not recall it, but the opinion speaks for itself.

Q. Did not he finally say in that case "That it had been carried to its fullest extent, and must be allowed to go no further?" A. I believe he did say that, and I endorsed it.

Q. Do not you remember that Judge Ruffin, who wrote the opinion in *Hoke v. Henderson* some years afterwards called attention to some language used in his own opinion, and said it must be understood that the Court will not go any further than it did in *Hoke v. Henderson?* A. I do not know.

Q. Did not the Court go further in the case of *White v. The Auditor,* in principle? A. I do not think so.

Q. In *White v. Hill?* A. I do not think so in principle.

Q. Did you hear Judge Douglas yesterday on the stand say that it extended the doctrine? A. I did not hear his testimony.

Q. Did not the Court extend the law in these political cases? A. It was not simply the question of one officeholder trying to take the seat of another, but it was an attempt on the part of the Legislature to distribute one man's office to several others, and that was the principle involved, and that is the way I stand now.

Q. Do you hold that that growing industry in the shallow waters of Eastern North Carolina is such an industry that each succeeding Legislature cannot revise it entirely, and by repealing all the provisions to put men in office, one session change the system, if necessary for the public good? A. They cannot do it if one man's term of office is not out, and they attempt to take that office from him, and distribute his powers and duties to several men.

Q. And if he had been put in for forty years? A. Certainly. There is nothing in the Constitution or laws to prevent any Legislature from extending the office of any one in the world. When the Constitution fixes a limitation to an office, they cannot interfere.

Q. I am asking about the Shell-Fish? A. I say that my view as a Judge and a lawyer is that in any office appointed or elected by the General Assembly, they can limit that term to one year, or five years, or ten years, or twenty-five years, or forty years, if they please, and no man complain.

Q. And that industry might grow until it was able to pay half the expenses of the State Government, White could have held it forty years? A. It is not the fault of the Judges, but the fault of the law-making powers that should produce such a contingency.

Q. That would not have been so if the Judges had not held the Acts of the General Assembly were void, would it? A. No.

Q. Have not some of the most eminent men on the bench of the Supreme Court of North Carolina said that the Supreme Court could not by mandamus draw money out of the Treasury, even though they found that the act that withdrew the appropriation of the money was of itself unconstitutional? A. I will grant it. I do not know of such a case right now.

Q. Weren't there cases presented to you by Judge Clark, showing that the United States Supreme Court in Joubal's case and a number of others had so held? A. I deny the proposition—and that is that the Legislature after making a special appropriation or specific fund for a certain office-holder, afterwards takes it from him. That is my position. I do not know whether I am with the most eminent Judges or not.

Q. Do you say that the Legislature could not by an act withdraw the appropriation for any officer in this State, and put it beyond the power of the Court to compel its payment by mandamus? A. I say that where a specific fund has been appropriated by one General Assembly to a specific officer, and he has discharged the duties of that office and earned his compensation, no succeeding Legislature can withdraw that money from him.

Q. Suppose a specific fund had been appropriated for the payment of any person for specific work, could that be withdrawn after the work was done? A. I am not called on to answer that.

Q. Suppose the General Assembly were to pass by appropriate legislation a law authorizing a building to be made on this corner down here, and appropriate $20,000 to do it, and employ a man at a stated salary to superintend that work, at $5,000, an architect, to make drawings, and superintend the work, could the Legislature, after the work was done, and before the money was paid, withdraw that ap-

propriation and put it beyond the power of the Court to force it by mandamus? A. I think they could.

Q. Then you think that a $400 man at the head of measuring oysters in the sounds of North Carolina, while they could not take his $400 away from him because it would interfere with the rights of property, vested rights under contract and impaired contracts under the Constitution of the United States, that they could take $50,000 from a man whom they had hired to do work in building a house? You think that they could not take that away from him, so that your Court could issue a mandamus and compel the Treasurer to pay it, but after he had done his work, after the money had been appropriated by the Legislature to pay it, you say they could withdraw that from him, and put it beyond your power? A. As a Judge and a lawyer, I do not think there is any analogy between the two cases. I learned from that case of *Hoke v. Henderson* this, that where the Government called into its service an officer like a Treasurer, or a Supreme Court or Superior Court Judge, or an Auditor, with a salary promised, and that man leaves his business and undertakes to perform that contract with the State, that the law will not allow that office to be taken from him as long as the office exists. I learned that. Now when you come down to matters outside of Government, for these officers are parts of the State Government, and put the question of a simple contract between the State and a laborer or mechanic, the principle does not apply, and there the Legislature for various reasons would have a right to interfere, and stop the payment of money. But it is inconceivable to me that any Legislature would take from a mechanic that which he has fairly earned.

Q. *Hoke v. Henderson* was put upon the ground that it was a contract between the State and a citizen? A. Yes, sir.

Q. Would not that be a contract between the State and a

citizen? A. Not a contract of carrying on the conduct of the State Government.

Q. The Shell-Fish Industry is no part of the State Government, is it? A. Oh, yes.

Q. It is developing a certain department? A. Of course it is an agency of the State. It is a big industry.

Q. And so is the Agricultural Department? A. Oh, yes.

Q. Putting up a building for the Agricultural Department, the Legislature could repudiate all that by withdrawing the appropriation? A. Oh, no; not repudiate.

Q. Could put it beyond the power of the Courts to force it by mandamus against the Treasurer? A. Yes, sir.

Q. But take a man employed to measure oysters, and by calling him an officer, it could go beyond that? A. I have answered that question fully.

Q. I will go back to *Hoke v. Henderson*. "There are many laws palpably unconstitutional which never can be the subjects of legal controversies. Not to allude to the causes which have been recently the themes of the bitterest political controversies, several instances of much simplicity may be adduced from our State Government. The Constitution of this State provides that the Governor, Judges, Attorney-General, Treasurer and other officers shall be elected by the General Assembly by ballot, and that certain of them shall have adequate salaries during their continuance in office. Suppose the Legislature to refuse to elect those officers; or to give them salaries; or, after assigning them salaries in a statute, to refuse to lay taxes, or to collect a revenue to pay them? All these would be plain breaches of constitutional duty; and yet a Court could give no remedy, but it must be left to the action of the citizens at large? A. Perfectly clear. I know, and everybody else knows, who has read *Hoke v. Henderson* with understanding, that the Legislature can refuse to levy a tax for the judiciary, and the Courts cannot enforce the payment of any tax. But where the State, like

in this case that you speak of, already takes a specific fund and lays it up high, not only by levying taxes, but by appropriation, dedicates it to a particular purpose, and particular men, that does not fit the case you refer to.

Q. You put that upon the ground that it is a specific fund set aside? A. Yes, sir; and they all admitted it. It was well argued by Mr. Busbee for the State.

Q. Did he argue the constitutional question? A. He argued the question as to which officer was entitled to that salary.

Q. Then it is a mistake to say it was a question as to whether he would have $400 or $900? A. You will see by my dissenting opinion that I paid no attention to that.

Q. He said nothing at all except as to the amount to be paid? A. I will say that I cannot answer that definitely. I will say that I did not discover anything as a Judge except an honest, fair statement of the question to the Court.

Q. You said he argued the question before it? A. I said as to which one was entitled to that fund, White or Hill.

Q. I am asking about *White v. Auditor*. Mr. Busbee did not appear in *White v. Hill?* A. You are right about that—in that one case, miscalling *White v. Auditor White v. Hill*—you are making a to do about it. The question he was called there to argue he argued fully.

Q. What is that? A. The question as to whether or not Mr. Worth ought to pay that money to the plaintiff in that case, was the question involved.

Q. Was not the question Mr. Busbee argued only whether it was $900 or $400? A. I would say no. That was not the only question he argued. I am not infallible—it may be true, but I would say no.

Q. You say it was admitted that this was a specific fund set aside? A. Yes, sir; Mr. Worth said in the answer the money was there.

Q. Then it was a fund in the hands of this man as trus-

tee for the benefit of these officers? A. I do not understand you—except I meant to say that Mr. Worth said it was. "There is a fund that is in my hand for this oyster industry. I do not know who is entitled to it, and I want the Courts to pass upon it."

Q. Do you understand that an executive officer other than the Governor, can come in and consent to the jurisdiction of the Court, and give to that Court jurisdiction? A. I do not think anybody can give jurisdiction to a Court.

Q. It was done in some cases? A. I do not think it could be done.

Q. In *Bailey v. Tod R. Caldwell,* did not the Governor go in and submit the question to the Supreme Court, and give them jurisdiction in that way? A. I never read it in that way.

Q. Cannot the Governor, notwithstanding the Eleventh Amendment to the Constitution of the United States, saying that no State can be sued in a Federal Court, cannot the Governor submit the question to the Supreme Court? A. I have answered that question. Nothing can give jurisdiction to a Court that has not got it.

Q. Has not it been held frequently so by the Supreme Court of the United States, that notwithstanding the 11th Amendment that takes away from the Federal Court jurisdiction to entertain suits against the State, cannot the Governor go in and assent to that jurisdiction, and thereby give them jurisdiction? A. I do not know.

Q. No State can be sued without its consent—cannot the Governor give consent? A. I do not know.

Q. Under the section of our Constitution where suit is brought against the State of North Carolina, an action has got to be commenced by a summons against the Governor? A. I did not know that. I thought it was done by petition, whenever a man had a claim against the State.

Q. How could you get the Governor in? A. Why I re-

member one case the application is filed before the Supreme Court, setting forth the claim demanded, and the Supreme Court in one case sent down to the Wake County jury to issue.

Q. But the State had to be in Court first? A. I do not think so.

Q. Would it do that *ex parte?* A. I do not know.

Q. You do not say that the Supreme Court of North Carolina could hear a case against the State without making them a party, and giving them opportunity to come in and protest it? A. I am speaking of a claim against the State. I did not answer your question, except to explain that I did not regard an ordinary claim against the State as I do the salary allowed to an officer for the performance of his duties and fixed by law.

Q. Do you know that this Court for the past ten years has held that a suit against the Auditor and Treasurer is a suit against the State? A. I do not know any case that I construed to mean that.

Q. Have not they discussed the subject? A. I do not think so.

Q. Was not it called to your attention by the dissenting opinion of Judge Clark? A. I can say that I have read every line of every dissenting opinion of Judge Clark over and over again, and I have never been satisfied with his propositions, and I am not now.

Q. I am asking you about the authorities he cites? A. I say they are not satisfactory to me.

Q. Do not you know that the Supreme Court of the United States has expressly decided that although a fund is specifically set aside by the Legislature, they can withdraw it, which is to take the power away from the Supreme Court? A. I do not know that, and I do not believe it is so.

Q. I understood you to say awhile ago, that the attempt on the part of the Legislature of '99 was to take the office

away from White and distribute his duties among others? A. That is the judicial construction I placed upon it.

Q. Then do you say that if that was their effort, and their attempt and their purpose, that they did not, under chapter 21, intend to withdraw that fund from the payment of White? A. I answer that by saying that the intent of the Legislature is a thing that I am not going to pass upon,unless the presiding officer requires me to do it. I am not going to the intent of the gentlemen who passed the law.

Q. I am asking what the Court held? A. The Court held that the act you speak of had no effect in the case, that the office was there and the fund was there and it could not be prohibited.

Q. I ask you if you believe that was the purpose of the Legislature to prevent that fund being used for the payment of White? A. I will answer that by saying that the act specifically said so. Now the intent you can settle yourself.

Q. Do you remember recently reading the case of *Shaffer v. Jenkins?* A. No, sir. I have not read it recently. I know the case.

Q. I ask you to construe this sentence from Judge Rodman: "Assuming that a Court of the State has jurisdiction to enforce by a writ of mandamus the performance by the Public Treasurer of a ministerial duty imposed on him by statute, yet these cases are not authorities, that such Court may enforce a payment of money forbidden by statute, upon the ground that the statute forbidding payment is unconstitutional." I ask you if it is not to hold that this Court in North Carolina and the Supreme Court of the United States, that no Court can take jurisdiction to issue a writ of mandamus against an executive officer like the Auditor and Treasurer, where the Legislature has withdrawn the appropriation, upon the ground that the withdrawal is unconstitutional?

Mr. F. H. BUSBEE: "I suggest that the volume be handed the witness."

A. If that office—and you will keep in mind that I did not pass upon that question in my dissenting opinion, my dissent shows that I did not discuss that, even.

Q. Why? A. I will answer frankly, if any case comes before me as Judge of the Supreme Court involving two points, one leading me to a clash with the General Assembly, one to a clash with the other departments of Government, I will always follow the course which will lead me in peaceful paths, for I know the danger to all Constitutions, republican in form, where the departments of Government begin to meddle with each other. But if White held that office, and he performed the duties of that office, and that fund was lying there for him, why the subsequent act could not defeat it, in my opinion.

Q. It was all unconstitutional. If the Legislature attempted to do it, the Legislature can do no act that is unconstitutional? A. Because *Hoke v. Henderson* says you cannot take the office from the man.

Q. You put it that the act was unconstitutional? A. I say they had no power to do it. Say for me it is unconstitutional, if you will.

Q. Is not that the truth. A. I said they did not have the power. You may run it back to the logical conclusion.

Q. I want it your way. I ask you if you could hold it that way, upon any other ground except that it was in conflict with the Constitution? A. I will say that if I have held that this man White was an officer, and that that specific fund was set apart for him to receive that money, and that the method of drawing it out was complete, as one of the Judges I should say the subsequent act was unconstitutional.

Q. The subsequent act forbidding it? A. Yes, sir. Where it was specifically set aside, and the method of drawing it out was complete, and the service was performed, I would say,

if the matter was before me, that the subsequent act forbidding it was unconstitutional.

Q. You would not interfere with the legislative will upon any other grounds but that the Constitution was the higher law? A. No, sir.

Q. Then it would be valid unless declared invalid because it was in conflict with the Constitution? A. Yes, sir; I have told you that emphatically, and I do not wish to dodge that question. And I will say further that if any power stronger than mine desires to dispense with my services, that I am ready. I do not dodge anything. I put it on the ground that did not clash, and I thought it was sufficient.

Q. Did not you know while this matter was being discussed in that body, while you were discussing your question as to whether you were not encroaching upon the legislative, was not that a great fight? A. Judge Clark was constantly insisting it was usurping power of the General Assembly, and that the General Assembly was supreme, and had authority for everything else.

Q. I ask you if it was not brought to such a point that you hesitated when the time came for that great writ to issue, the Court hesitated? A. I will answer that promptly, strongly—I saw no hesitation. Judge Furches spoke prompter, longer; Judge Douglas in an equally certain strain, but with more polish of manner; Judge Faircloth, in his own way, but to the point. I saw no hesitation.

Q. The first thing that came before your Court was Mr. Harris? A. Yes.

Q. He moved for the writ? A. I never understood what he moved for—I was there, but I could not get at what he was after. He had nobody in Court, he had no affidavit, but seemed to want some relief for the money. He made a motion of some sort about the money.

Q. There was a motion? A. Upon my conscience, I cannot say.

Q. Objected to on the ground that there was no notice served on the other party? A. I heard Judge Faircloth say that.

Q. And then he retired? A. Yes.

Q. And then he retired? A. Yes, sir.

Q. And then Mr. Cook from Warrenton came? A. It may be so.

Q. Did not he come in the next morning and renew the motion, and point out to the Court that there sat Mr. Cook, representing the defendant? A. If you ask me, I will say I do not recollect. It may be true.

Q. Did not he renew the motion, and then was not the objection made that he had no affidavit; you asked if he had affidavits? A. Yes, sir; I think so.

Q. Upon that, the motion was rejected the second time? A. Yes, sir; or at least not passed upon.

Q. Did not you say "Go to the Clerk?" A. Either that, or the first time; I thought he ought to have known it.

Q. That would have saved the Court the responsibility? A. According to the opinion of these Judges, that would have been regular, to have gone to Colonel Kenan, and said, "I want my man's money; issue execution on this judgment." Colonel Kenan might have said the instructions were not distinct enough. Then the regular way would have been for Kenan to have gone in the Supreme Court in open Court, where I was ready. Then when Mr. Harris had introduced his motion upon proper affidavits, when he had made demand upon the Clerk of the Supreme Court to issue execution, which the Clerk failed to do, then the matter would have been instituted before me in Court, and I would have made a ruling. But Colonel Kenan did not do that. He came before the conference, and was satisfied then to go along with the majority of the Court.

Q. You do not pronounce judgment in open Court at all? A. No.

Q. You all pronounce them right there in that conference? A. Yes, certainly; and we go and file opinions.

Q. And the judgment is the mandate of the Court to the Clerk? A. Yes.

Q. You rendered that decision the 22d day of May, 1900? A. Yes, sir.

Q. There was nothing further done until you met again in September about that matter? A. I suppose not. I know as little about that as the man in the moon. I never heard of it—I had prayed I might never hear of it. It is something to me I never wanted to hear of. These office-holding cases had worried my life out of me. I had never heard anybody speak of them, except that conversation with Mr. Worth, and I never spoke to anyone else.

Q. You did get information that the officers were not going to pay money out, except by a written order of the Court? A. I did not hear it.

Q. Mr. Harris said it? A. I do not know what his testimony is.

Q. Did not you know they were refusing to pay if the writ was not issued? A. I told you I did not. There was no communication between me and those officers. I am not a go-between.

Q. Were you sitting there with Judge Furches and Judge Douglas when Mr. Harris made the motion? A. I suppose I was; I did not hear that remark, and if he said it, I did not hear it. You can very well see that when I told him to go to the Clerk's office, I dismissed that matter from my mind.

Q. Colonel Kenan came and asked the opinion of the Court, and it was so uncertain that he would not issue the writ, and came the next time? A. He came the next time, but whether it was so uncertain or not, I do not know.

Q. And the last time he just stayed there until he got the opinion of every member? A. Yes, sir.

Q. And when three members told him to issue it, you said to him—you had, already said do not issue it—when three said issue it, you said, "That settles it?" A. Yes, sir; and I say it now. I said to Colonel Kenan, "You come in here and ask the advice of the members of this Court around the consultation board as to your duty in the matter. Three have said one way and two the other. That settles it."

Q. That meant for him to go and issue the writ from the Court? A. Why, of course.

Q. Directions from the Court? A. Not as a Court. You ask me serious questions as a Judge of the Supreme Court, and then laugh in my face. I insist that I am entitled to more respect than that. You ask me a question involving my integrity, and that of every other Judge on that bench, and then, before you get an answer, you laugh at me.

The PRESIDENT: "Answer the question."

A. I said that all the time around that board—I said a dozen times to Judge Clark and everybody—to Colonel Kenan and the Judges, "We are not in session, and I am not in a Court; and I am not passing upon this thing in my judicial capacity. There is no motion here—there is nothing before us."

Q. Why did it take so much discussion, and why was it that dozens of times you disclaimed being in session, and disclaimed that it was the order of the Court? A. Because it is the law and the fact that we were not in session as a Court, and Colonel Kenan never has said, and I never will say, he approached that Court as a Court.

Q. Did not he just do what he has done hundreds of times, come into your Court while sitting in conference, and ask for orders? A. Not hundreds of times, a half dozen times. No Judge would ever have dreamed of putting Colonel Kenan in contempt for not obeying that.

Q. Do you say Colonel Kenan did not go out of the Court room where you were in conference as Judges, authorized

and directed by a majority of the Court to issue that writ? A. I say he did not have that impression and could not have it; that he had an opinion of a majority of the Judges of the Supreme Court that he ought to issue that writ, and he did not wait for orders, but went and issued it.

Q. What do you mean when you said that? A. I meant as far as you are concerned, you have been troubled about this matter for two or three days—you have got three Judges out of five, and that settles your trouble.

Q. You meant that that meant for him to issue the writ? A. He could not have done otherwise. It never entered my mind that a Clerk would ever refuse to carry out the mandate of a Court, whether in consultation or on the bench. I never dreamed of it.

Mr. WATSON: "I want to say to you, that I did not at any time intend to be disrespectful to you."

Witness MONTGOMERY: "I am glad to hear you say so; I know your nature, and it is all right. You know nobody likes to be laughed at."

Mr. WATSON: "But a man sometimes can not help laughing, you know; and it comes out before he knows it."

Senator HENDERSON: Will Associate Montgomery state and explain fully to the Court of Impeachment what arguments were used before the Supreme Court in regard to the question of ordering or permitting the writ of mandamus to issue against the Auditor and Treasurer in the case of *White v. The Auditor and Treasurer?* A. There was very little argument used; as quick as Colonel Kenan made the request, Judge Furches spoke at once, and Judge Faircloth followed, and Judge Douglas next. It was done at once. The argument there, as I recollect it, was who was entitled to this fund in the hands of the Treasurer, whether the plaintiff White or the other man.

Senator Henderson's question read over to the witness:

Q. Will Associate Justice Montgomery state and explain

fully to the Court of Impeachment what arguments were used before the Supreme Court in regard to the question of ordering or permitting the writ of mandamus to issue against the Auditor and Treasurer in the case of *White v. The Auditor and Treasurer?* A. I do not recall the argument.

Senator MORTON: Is there any law upon the statute books of this State making an office property? A. No.

Q. 2. By Senator MORTON: In the absence of statute law and constitutional provision, please explain the right of the Supreme Court to make an office property? A. I will not undertake to do that. I can only say that the case of *Hoke v. Henderson* established the doctrine, and it was delivered by as able a Judge as ever sat on the bench, and has been authority from that time to now. The doctrine is based upon judicial construction observed through all these ages since that time.

Re-Direct.

By Mr. COOK:

Q. Mr. Justice Montgomery, does the question upon which the decision in *Hoke v. Henderson* was determined depend upon a construction of the State Constitution or a clause in the United States Constitution? A. The State Constitution, as to whether it was property or not.

Q. In the 72d volume of the Reports, there is a decision of the Supreme Court upon this same subject. They have adverted to a decision made there. Who wrote that decision? A. Judge Pearson.

Q. What position did he hold upon the Court? A. Chief Justice.

Q. Please read the expression in the second clause? Witness reads: "It follows that the Courts have no power to compel, by mandamus, the Public Treasurer to pay a debt which the General Assembly has directed him not to pay, or

the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the act of the General Assembly be void as violating the Constitution of the United States or of this State."

Q. How was that construed? A. I think that meant that where the prohibition does not come in, the warrant can issue.

Q. If the act is unconstitutional, it can issue? A. Yes, sir.

Q. In your cross-examination, you answered the last question of Mr. Watson substantially in these words, that it never occurred to you that the Clerk of the Court would disobey a mandate of the Court? A. I do not think that I used the word mandate.

Q. What do you desire to say now? A. I meant to say this, and I intend to say this, that when the Clerk of the Supreme Court would come before our body, if on the bench in open session, or in the consultation room, for advice, it is only to be supposed he would follow the advice given him from the bench. I did not know I used the word mandate.

Re-Cross-Examination.

By Mr. WATSON:

Q. You never issue a mandate from the bench; you always issue it from the consultation room? A. I will answer that in this way: If I should have a hand in issuing a peremptory writ of mandamus, I should regard that as an opinion of the Court, and delivered from the bench.

Q. When you issued that writ on motion of Mr. Wilson, did you issue it from the conference room? A. I do not recall that.

Q. You would not draw judgments when you are sitting on the bench? A. We hear arguments on the bench, write our opinions, pass them around, revise them, and if they are satisfactory all around, throw them on the Consultation Board.

Mr. F. H. BUSBEE: "We ask that the rules be observed. The question was simply as to the use of the word 'mandate.'"

Mr. WATSON: He testified that the mandate issued from the bench. I want to ask him what he means by mandate? A. I mean by mandate a process which comes from hearing a motion, or comes on the bench.

Q. But the order always comes from the conference rooms? A. Oh, yes; of course it does not come from the bench.

Stand aside.

Dr. B. F. DIXON, *State Auditor, recalled for respondents.*

Examined.

By Mr. LONG:

Q. Dr. Dixon, since you have been in office, have you paid any claims of Theophilus White as Shell-Fish Commissioner? A. Yes, sir.

Q. Have you those vouchers with you? A. Yes, sir.

Q. Produce and read them.

Mr. WATSON: "What is the object?"

Mr. LONG: "They offered in evidence a voucher that had been paid by the previous Treasurer to Theophilus White. We think that the fact that the vouchers as made out now adhere to the same form as the voucher which they themselves introduced as having been paid by the previous Treasurer, had been recognized and paid, that it tends to show some light on this transaction. And we think it is competent to show the action of the officer of the government. As we understand it, their contention is, that the claim for the appropriation to this, could not be applied to that under the act. Here is a voucher that has been complied with, as we contend, under the decision of the Court,

and has been recognized and paid by the officer of the government, and within the present year. Upon my objection, if the Court please, to the voucher as not having been before approved, the Court ruled that it had come into the proper file, and that it was competent. I offer these same records in the same office, that have been approved in the asme way, and recognized by the present officer of the government."

Mr. WATSON: "I do not see how it could possibly be competent."

The PRESIDENT: "I sustain your objection."

Mr. F. H. BUSBEE: "I desire to be heard a moment about that. A few days ago, the Auditor was allowed to prove, over our protest, certain claims proven by White as chairman of the Shell-Fish Commission, and by one Harris, acting as Secretary, upon the allegation that it showed a bad mind—"

Mr. WATSON: "We withdraw the objection."

Q. Just produce those vouchers? Witness reads: "For money advanced for payment of alterations proposed—and some other things, for Steamer Lillie, $74.20, proved by Theophilus White, C. I. S. F., and by T. W. Harris, Secretary. Paid 30th January."

Q. Who issued the warrant? A. I wish to make this statement, that coming into the Auditor's office we found it necessary, as all have done, hitherto, to retain for awhile the Chief Clerk in that department, and after a claim has been passed upon by the Auditor, the Chief Clerk usually signs the warrant, and these were signed by the Chief Clerk.

Q. Give us the others? A. Here is one paid January 22, proved by Theophilus White and T. W. Harris, Secretary. Amount, $181.33, his salary.

Steamer Lillie, Willis & McIntosh, repairs, $93.31. Signed Joseph Harris, proved by Theophilus White and T. W. Harris.

J. A. Morehead, $29.75, New Bern, N. C., material furnished Steamer Lillie, proved Theophilus White, account J. A. Meadows.

Coal for Steamer Lillie, paid January 17, proved Theophilus White, amount $23.25.

Q. Is Harris's name there? A. No, sir; the claims for the steamer do not have to be signed, except by Theophilus White. All the claims to him are signed by himself and the Secretary, but those for other purposes we get receipts from the party furnishing the material, proved by Theophilus White. Here is a rebate, January 21, by the Clerk of the Superior Court, for $37.88. He does not sign that.

Q. Are there any other claims there? A. No, sir.

Cross-examined.

By Mr. WATSON:

Q. The great number of claims on file now you have not allowed? A. Yes, sir.

Q. Amounting to how much?

Mr. LONG: "They have not been acted upon."

WITNESS: I refused to pay the others. These vouchers were all paid up to the time that the Legislature took action in the matter, and then under the advice of the Attorney-General, and the counsel of State, I declined to pay any further.

Q. But they are still coming in for large amounts? A. Yes, sir.

Stand aside.

J. A. ODELL, *witness, called in behalf of respondents, being duly sworn, testifies as follows:*

Examined.

By Mr. BYNUM:

Q. Where do you reside? A. In Greensboro, N. C.

Q. In what buisness are you engaged? A. Wholesale hardware merchant.

Q. Do you know Robert M. Douglas? A. I do.

Q. How long have you known him? A. I have known him, I suppose, for over twenty years.

Q. Do you know his general reputation? A. I do.

Q. Please state what it is? A. It is good.

Stand aside.

J. S. HUNTER, *witness called in behalf of respondents, being duly sworn, testifies as follows:*

Examined.

By Mr. BYNUM:

Q. I believe you reside in Greensboro, also? A. Yes, sir.

Q. In what business are you engaged? A. Manufacturer of overalls and pants.

Q. Do you know Judge Robert M. Douglas? A. Yes, sir.

Q. How long have you known him? A. About fifteen years.

Q. Do you know his general character? A. I do.

Q. What is it? A. Good.

Stand aside.

Prof. DRED PEACOCK, *witness called in behalf of respondents, being duly sworn, testifies as follows:*

By Mr. BYNUM:

Q. Where do you live? A. Greensboro, N. C.

Q. In what business are you engaged? A. School teaching. President of the Greensboro Female School.

Q. How long have you been there? A. About seven years.

Q. Do you know Judge Robert M. Douglas? A. I do.

Q. How long have you known him? A. About ten or twelve years.

Q. Do you know his general character? A. I do.

Q. What is it? A. Good.

Stand aside.

J. W. FRY, *witness called in behalf of the respondents, being duly sworn, testifies as follows:*

Examined.

By Mr. BYNUM:

Q. I believe your home is in Greensboro? A. It is.

Q. What is your business? A. I am in the banking business.

Q. Do you know Judge R. M. Douglas? A. I do.

Q. How long have you known him? A. About fourteen years.

Q. Do you know his general character? A. I do.

Q. What is it? A. Good.

Stand aside.

Mr. JARVIS: "Mr. President, I desire to call the following-named witnesses, and request they will respond.: W. W. Clark, Jas. C. MacRae, W. J. Montgomery, H. C. Jones, C. F. Warren, T. N. Hill, I. F. Dortch, T. M. Argo, T. W. Bickett."

All these gentlemen answered to their names with the exception of I. F. Dortch and W. J. Montgomery, who were not in the Court.

"Mr. J. C. Martin we have named, but we will not call him, as he is a family connection of one of the respondents. I believe the deposition of W. P. Bynum, Sr., has been received and filed."

The PRESIDENT: "It has been received."

The President states that the rule is to swear the witnesses

as they are examined. "The rules allow but two witnesses to prove the same fact, and, I think, the Court is entitled to know who are sworn and examined; that is why I have adopted the rule. We must respect the wishes of the Lgeislature."

Mr. JARVIS: "It is simply a matter of pay, then?"

The PRESIDENT: "Yes, sir.

The hour for adjournment arrives and the Sergeant-at-Arms adjourns Court until this afternoon at 3 o'clock.

Afternoon Session.

The Court reconvenes at 3 o'clock and is called to order by the President.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell; Miller, of Pamlico; Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard. Forty-eight.

The PRESIDENT: "Call your witness."

Mr. OSBORNE: "Mr. W. W. Clark will please take the stand."

Q. What is your profession? A. Lawyer.

Q. How long have you been practicing law? A. Something over twenty-three years.

Q. Have you examined the case of *White v. Auditor?* A. I have.

Q. Do you think that you will be able, after such examina-

tion, to give an opinion satisfactory to yourself as to whether the decision in the Supreme Court was correct or not? A. I do.

Mr. WATSON: "We object."

The PRESIDENT: "Upon what grounds."

Mr. WATSON: "I suppose he intends to ask for an opinion."

Mr. OSBORNE: "State whether or not, in your opinion, the judgment of the Court in that case was correct according to the laws of North Carolina?"

Mr. WATSON: "We object."

The PRESIDENT: "Do you desire for me to rule on it without any argument?"

Mr. C. M. BUSBEE: "The law is presumed to be known, of course. We have no conception of any ground upon which the evidence will be admissible."

Mr. COOK: "I shall be very brief in the observations I shall make in support of our motion that this evidence be allowed. I shall be sustained in this view by very brief speeches by my associates."

The PRESIDENT: "The rules give you half an hour on each side."

Mr. COOK: "We will not ask your Honor to extend it."

"Mr. President and Senators, this is offered, as the lawyers in this body know, and as all the Senators, I doubt not, have heard, as expert testimony. Now, Mr. President, in respect of this trial and in respect of this evidence, it would be very difficult for us to find an authority for the assumption that we were entitled to this as a matter of right. Impeachment trials do not furnish, as you well know, Mr. President and Senators, authoritative precedents upon questions of law, and that is because of the very nature of the trial. They are not rulings that become a matter of record; they are not exceptions to instructions given by the presiding officer of this Court and reviewed by an appeal; they are not written opinions which

are authoritative with the grounds thereto found in any volume accompanying them, and we have to rely upon what is said in the trial largely and for the result of the trial, which may be regarded as sustaining one view of it and without passing upon a question of law which is raised in the question directly.

"Our view upon the reasoning of it is this: Meeting the objection that this being a high Court of Appeal, that there is no right to introduce any expert testimony before them on questions of law, it being not only a high Court, from which there is no appeal, and in contemplation of law, is a Court of the last resort and of the highest degree of intelligence upon the question of law.

"Now, Mr. President, much or many of the authorities which would be referred to in support of the objection, not that it has been decided that way, but many of the authorities that would be relied upon, because of the reading in that direction, would be the House of Lords. The House of Lords sits as a Court not only in impeachment cases, but many other cases involving rights of citizens and private bodies. Now, when they are in doubt in respect to any question of law, they appeal to the Lords of the law—the law Lords, who are in the House—and they deliver their opinion. The House of Lords, desiring to be informed, even in this recollection and in the recollection of the youngest gentleman of the bar, summoned a distinguished lawyer from New York to attend a trial in the House of Lords to testify what the law was in the city of New York. They say, 'because that is the foreign law.'

"We are now tendering this evidence to settle what the law is. If we were offering this evidence to establish what the law is, the gentlemen on the other side might object in that these gentlemen ought to know the law, and the wrong is that you are trying to instruct the highest Court in this Commonwealth. But it is this, Mr. President and Senators, it is not what the lawyers say, but in respect to one element of this

crime that you have got to find before you can find these defendants guilty; it is what the law appears to be. You have no right to convict these Judges unless you shall reach the conclusion that they intended to do wrong in this matter. I know what position I am controverting and from what high authority it emanates, but you will understand that the fight is there, and I say that because your eminent presiding officer has no right to settle that question for you. He can not say that the question in contention is a controlling one. It can never be settled, except by your vote. No separate issues are submitted to you to be determined in advance of your verdict in this question. That being so, I think I may safely assume, standing in this presence and recognizing all matters of this great trial in this great tribunal, that you will not assume in advance that this Senate will conclude, out of deference of positions that have been taken, that it is not a question of intention. Now, if you assume, gentlemen, that it is a question of intention, and I do appeal to you, whatever may be the result of your mind now, after a calm consideration of this motive, I beg of you not to put it upon the grounds that the question of intent had nothing to do with this case. If it is a question of intent, we say that, bearing upon a question of intent, we have a right to introduce any evidence here that tends to prove what the law appeared to be.

"Now, Mr. President and gentlemen, turning to Chase's trial, if I may be allowed to refer to that as authority, the question as to what the law was in the State of Virginia in respect to one phase of it, and what was the law in the State of Maryland—the law governing the practices, the methods for the administration of Justices—and witnesses were allowed to testify. I don't care to read it if you controvert that point, but you will find that several witnesses were put upon the stand without objection and were allowed to testify as to what the laws were. It was applied, not to the State

Courts, but was directed to the practices in the Circuit Court of the United States. It was a United States trial, it was an impeachment trial, and yet they allowed a number of witnesses to testify as to what is the law of the practices there. Further than that, as a question of law, Mr. William Marshall was allowed to testify in that case that, in his opinion, he did not regard the language which was used by the Judge, who was presiding at that trial below, as warranting impeachment.

"Now, this is the authority that we have. I don't want to take up too much time. Mr. President, I desire to say this: a good deal has been said about the experts that we have brought here, probably much that ought not to have been said, but, Mr. President and Senators, and I hope this won't be taken out of our time, remember the attitude that these respondents were placed in in respect to this charge. When you had preferred those Articles of Impeachment, you had before you there two Associates on the bench; you examined them upon certain questions. Now, this was scattered broadcast all over the land, so far as they were concerned. This was applied to many impeachment trials; I am speaking of the nature of the trial.

Mr. Manager ALLEN: "The only thing we want to understand from Capt. Cook is whether he was reflecting upon the examination of the sub-committee?"

Mr. COOK: "I think the gentleman paid attention to my remarks, and if he had, there would have been no occassion for that inquiry. I expressly said it was so in the case of impeachment, and I was not making complaint against the management in this trial."

Mr. Manager ALLEN: "I had understood him to say that these witnesses were simply sworn to answer particular questions and not to tell the whole truth. I inferred from that, that the gentlemen who were making the examination were simply directing their examination, and not wanting the whole truth."

Mr. COOK: "I did not say that. When you sit there and examine these witnesses, you don't come and ask him to tell all he knows about it, and I don't say that I am not objecting to this. I am saying in the very nature of things, when these men could hardly be advised as to what position was to be taken, except what they saw there, their all was involved in this thing, and they have tried to do their best to justify these things, and I have brought here men of learning in the law to sustain them in their defence. I can not think, and I do not mean to apply—far be it from me—standing upon their honor and integrity, that they would ask this. But I have a right to discuss these methods, whether they be approved by precedents or not. I must do it in respect to the great issues involved in it.

"Now, Mr. President, that is our view about this matter. We understand what is involved in this expert testimony. We know that there are a number of lawyers in this body. It certainly can not be excepted to by them. There are some of them here to whom I have been too often to, in the practice of my own profession, to ascertain what the law is. But let that go by. As a matter of fact, there are a number of men in this Senate who are not lawyers. If they are sufficiently satisfied that they are advised about the law, then I say to you, we don't desire to insist upon this thing. It is a privilege that you would have a right to ask if the opportunity were given. You are better judges of this necessity than we. I sincerely trust one thing: that the fact that we have offered this will not be construed as any reflection upon your intelligence. I don't say more, but I would be glad if some others would speak on this."

Senator MORRISON: "Mr. President, if it is desired by counsel on ether side, I would be glad to make a motion to extend the time allowed for discussion upon this question, in order that they may be fully heard."

Mr. COOK: "How much time is left?"

The PRESIDENT: "Ten minutes."

Mr. C. M. BUSBEE: "If I undertsand it, Mr. President, the position of the counsel who has just taken his seat is that the respondents are entitled to prove by this witness that, in his opinion, a certain opinion delivered by the Supreme Court of North Carolina is good law, and that the Supreme Court in delivering that opinion did not intend to nullify any law that had been passed by the General Assembly of North Carolina.

"Now, as to the first proposition, Mr. President, as I understood my brother Cook to virtually admit, it is contrary to all the precedents, but he says that the peculiar circumstances surrounding this case are such that this tribunal is relieved from the rule which the precedents establish. I can find no authority, Mr. President, for that position. If there has been one question, which I ascertain upon thorough inquiry into the authorities has been settled, it is that this evidence is not admissible. The respondents are trying to prove what is law in North Carolina by the opinion of the witness who is upon the stand. Now, I am very willing to concede that it has been settled by the decisions in North Carolina following our statute that what is the law of a foreign jurisdiction can be proven by oral testimony, but that whenever the law of the forum is in controversy the opinion of no witness, however accomplished a lawyer he may be, is admissible in evidence.

"I cite you first to a standard work: Lawson on Expert and Opinion Evidence, and to rule 19. 'The law of the forum can not be proved by the opinion of lawyers.' I also cite you to 'Rogers on Expert Testimony,' another standard work, and to page 18, sub-section 7. 'The opinion of a witness on a question of law or legal application is inadmissible, except in cases of foreign law.' Upon those authorities, Mr. President, it is absolutely settled that no opinion of a lawyer, however astute he may be, however long his experience, and however great his professional ability, can be admitted in a

Court of Justice upon a question of law, and our Supreme Court has affirmed that doctrine in the case of *Hooper v. Moore,* 50 N. C., 130.

"The Court is presumed to know judicially the public laws of our State, while in respect to private laws and the laws of other States, this knowledge is not presumed, and therefore oral testimony as to those is admitted. When an issue of fact involves a question of law, the jury are not entitled to decide it, but it is the duty of the Court to give instructions to the jury in regard to the law. The opinion in *Hooper v. Moore* affirms positively the rule laid down in Rogers and in Lawson. It was by Chief Justice Pearson. I have a list of decided cases in many States which declare the same rule, but I do not care to take the time of the Court in reading them.

"This is the highest Court in North Carolina. If my friends were prosecuting a case before a Justice of the Peace, they would not have thought of tendering evidence like this. And any rule which governs a trial, the methods of trial, the course of trial and the admission of testimony in any Court in North Carolina is applicable to any evidence in this Court. My friends say that they are without authority. If so, Mr. President, how can it be ruled, when the precedents are entirely to the contrary, that this evidence is admissible? What would be the result of introducing the opinion of lawyers for both sides? There are other contested questions. Are we to shift all the issues in this trial to another plane and have this trial descend to a controversy between variant and conflicting lawyers upon every disputed proposition that may arise? What might it become our duty to do if this evidence is admitted? It might become essential for us to produce lawyers from all portions of North Carolina and show six to one or twenty to one, that, in their opinion, the opinion of the Supreme Court was not correct and that its judgment was utterly void. Our minds would be taken away from the issues and we would have a symposium of conflicting legal

opinions from Tom, Dick and Harry. My friend shakes his head, but that would be the effect of it."

Mr. COOK: "We have no Toms and Dicks; you may have the Harrys. I heard him call some Toms."

Mr. BUSBEE: "What I mean is this: If by any stretch of the rules of evidence, this evidence should be admitted and this Court should sit here and consider the facts not by the evidence, not by consideration themselves of the opinions and judgments of the Supreme Court, but be governed in forming their opinions by the opinion of Mr. Jones, Mr. Smith, and others, what their opinions are as to whether the opinion of the Supreme Court is right or wrong, then there would be an absolute subversion of all the rules of evidence that prevail in every other Court in this country. Now, I submit, Mr. President, that this Court is not governed by any other rules of evidence except such as are applicable in a trial before any Judicial tribunal in North Carolina."

Mr. LONG: "I have been requested by my associates to speak a word, and will not detain the Court but a few moments. It is to be regretted on this trial that we have so few precedents as to the admissibility of testimony of this kind in trials of impeachment. The reason is that, fortunately for the country, there have been few Judges put on trial as in this case. Hence we have few precedents. The only precedent which has been called to our attention was in the case of the trial of Judge Chase, cited by my learned associate. But notwithstanding the fact that we have but few precedents, we are nevertheless able to consider the question which we now have presented to us, and I hope to have it decided in conformity with what ought to be the precedent. I will begin with the case my friend mentioned. of the Justice. Under the Constitution and Laws of the State we begin with the Court of Justice of the Peace, who is both Judge and jury; but if he errs there is an appeal to the Superior Court. We now ascend to the Judge of the Superior Court. He has his

jury as a constituent part of his Court, and he is authorized to tell them the law of the case; if he errs the defendant can appeal to the Supreme Court. We ascend further and come to the Supreme Court bench, where we have five Judges; not in all cases can there be an appeal from a judgment of that Court, but if a federal question is involved an appeal can be taken to the Supreme Court of the United States. We now go one round higher and reach a Court composed of fifty Judges and fifty jurors. It is a Court and jury in one; authorized to find the facts, and their decision as to them is final and each to judge for himself as to the law. Their decision is final and can not be appealed from. So that we are in a Court, Mr. President and Senators, from whose judgment upon the law and the facts there is no appeal. If the trial were in an inferior tribunal, Senators, if any of you had formed and expressed an opinion before you were empanelled that the defendants were guilty, then the Court would exclude you from the jury box, but in this Court we are denied even that right. But we do not complain of it; I only allude to it that you may get my views in regard to the extraordinary powers you are called upon to exercise. Now, what is the charge? They charge in the Articles of Impeachment that the respondents wilfully and intentionally violated certain provisions of the Constitution, and also a positive act of the General Assembly; so that we are brought here and confronted with our intentions in doing, what? Just think of it a moment. In sitting down and writing an opinion of the Court, and that at the time we wrote it we intentionally violated the laws of the land! What laws? There sit my learned friends, the Managers, with their able counsel and learned lawyers. I take it for granted, Mr. President, when we come to the argument of the question in this Court, that every Senator, upon his conscience and oath, must say these are the facts as I find them, and this is the law as I find it, will appreciate the fact that his judgment is final and irre-

versible. I do not suppose then it will be insisted by my learned friends on the other side that their understanding of the law is the law. I take it for granted that when my learned associates come to argue this question, they will tell the Court what they understand the law to be and insist that it is the law. If we were before a Judge of the Superior Court, reading from Lawson, the Judge would be responsible for the law. The lawyers would present their contentions, and after they had done so the oath of the Judge requires him to tell the jury what the law is, and if he is wrong, his decision can be reversed. But when our arguments have ended here, and when this honorable Court is sent to its room for determining finally upon the questions, Mr. President, the Constitution and organization of this Court does not allow or permit you, as the presiding officer of the Court, to pass upon the contentions of my friends upon the other side and instruct as to what the law is, but each Senator for himself must decide what it is. They say that when the respondents, our clients, wrote this opinion authorizing this mandamus to issue, that they were guilty of intentional violation of the laws of the land. I do not know what you may think about it. I should regret very much to be in the place of a Senator who has to pass upon so very vital a question, and declare for myself what the law was, when if I committed error I might send one of my fellow men branded with disgrace to his grave. But, Mr. President and Senators, it seems to me it would have a wonderful effect upon my conclusion if learned lawyers, and we have no other but learned lawyers, were brought here to testify. I do not wish to say anything improper at all, but out of the list there can be selected those who are fit to sit upon the Supreme Court bench. It seems that when it comes to solve this question as to whether the defendants have written a wrong opinion wilfully, in violation of the law of the land which they have sworn to obey, that the opinion of learned and disinterested

lawyers might aid in its solution; that they might be permitted to come in and say that on examination of this case of *Hill v. White* and *White v. Auditor,* if they had been on the bench, under the precedents in North Carolina, they should have written the opinion as the Court did, or would have concurred in it. But we are met with the argument, sometimes a plausible one—*ab inconvenienti.* Why, he says that possibly they would have to bring some witnesses here who would have different opinions from those we brought. Possibly they might bring ten to one or sixteen to one, I have forgotten which he said, and possibly they may have to do so, but our clients should not be convicted on account of a slight inconvenience.

Now, Mr. President, I say we have not many precedents on this question, and there is a reason for it; but the general doctrine on the point as to when expert evidence is admitted is laid down here in the case, 104*Penn. St.,* page 379, in which the Court says: "The proper intention of witnesses offering to give testimony as experts is to instruct the Court and the jury in matters so far removed from the ordinary pursuits of life that accurate knowledge of them can only be given by study and experience, the object being to enable both the Court and the jury to judge upon the several facts introduced in evidence." And I have found a citation appended to the back of the book from which my learned friend read a moment ago, reported in the 43 *Conn. Rep.,* at page 83. I will state that this was a trial in regard to the probate and execution of a will. The expert, a lawyer, was put on the stand for the purpose of showing what was the law formerly respecting the execution of wills in the State of Connecticut. The Court ruled out the evidence and it was excepted to. It went to the Supreme Court. The Court says that it was not error to have excluded it and goes on and says this: "The construction of the statute was a matter for the Court and not the jury; in construing the statute he may have, had he

chosen to do so, called to his aid the wisdom and experience of eminent counsel, but he was not bound to do it, and his refusal to do so is not erroneous." The expert was put on in regard to the requisites necessary to prove the will. The Court in that case, according to the Supreme Court of Connecticut, could have heard men learned in the profession testify as to the law. I take it for granted that the Judge would ultimately have been required to declare the law himself. They say, while it was not erroneous to hear the expert testify, that he could have done so, and that it would not have been error for him to have done so. So that, Mr. President and Senators, I think it is a question for each Senator to say that as these men are charged with violating the law in writing the law, as to whether they would like to have the opinion of eminent counsel to say if in their opinion there was a violation of the law—whether there was an opinion written in violation of the law. The Judges are being tried for erroneous opinions. Who shall tell whether they are erroneous, unless we get the information from disinterested lawyers?

Senator GUDGER: "I move that the time be extended half an hour, giving each side one hour for the discussion of this question."

Mr. POU: "The contention of our friends on the other side has not even the merit of being plausible. Their reasons are not even *prima facie* reasons. They have stated what is the ordinary doctrine as to expert testimony, that when it is about something of which ordinary persons do not know, then a person learned in that science may be called in as an expert. But as to questions of law this rule would not apply, because all persons are supposed to know the law, and every person or juror is required to take the law as it is in the books or delivered to them by a Court, and the most common of all judicial officers, a magistrate, is required to take an oath that if any letter of advice comes from any person he will not

follow that letter. They say there are no precedents; and they speak well. The highest precedent in the land is on our side. In 1868 Andrew Johnson was on trial before the Senate of the United States. The charge against him was that he overstepped the functions of the executive and encroached upon the functions of Congress. He was impeached for that, and he introduced expert evidence to show that the act was not an infringement of the acts of Congress or that they overstepped the bounds of the executive. The Senate of the United States excluded the testimony offered to prove that his cabinet advised him to do it, and the advice of the Attorney-General was also excluded.

"I will read one of the questions excluded: 'After the restoration of Mr. Stanton to office had you formed an opinion whether the good of the service required a Secretary of War other than Mr. Stanton, and if so did you communicate that opinion to the President?'

"That is one of the many phases in which the question was presented to the court, and it was ruled out. Now I cite your honor to Greenleaf on Evidence, I suppose the greatest writer on evidence the country has produced: "But witnesses are not receivable to state matters of legal or moral obligation, nor as to the manner in which other persons would be influenced if the parties acted in one way rather than in the other. "

"Now suppose this evidence was offered in any other court. Take it even as they state it, as a question of intent upon which the question of guilt or innocence determines, is it conceivable that any lawyer would propose to bring a man into Court to swear to the jury that there was room for an honest intent under the circumstances. If the case came to the Supreme Court is it conceivable that the opinions of outsiders would have any weight? Yet here is a Court, the highest in the land, judges of the law as well as of the fact, sworn to try the case, and the counsel propose to bring persons before

them to give their opinions as to the circumstances of the case. It seems to me to be a proposition which can not be argued. All the text-books are against such a proposition. The precedents are against it and the only citations they have made are of laws clearly antagonistic to this principle. They have cited cases where medical or scientific experts are to be examined, and they say, and that we admit, that when laws of foreign jurisdictions are to be passed upon, courts are permitted to introduce evidence as to the laws; but in no instance cited have they shown any case applicable to the contention now before the Court.

"In the case cited just now, a lawyer was tendered and excluded, and the Court says that the exclusion was not erroneous, but that the Court might have heard him if it so desired, and that its hearing him would not have been erroneous. It was simply a confirmation of the practice that the Court may call in a friend, an *amicus curiae,* to give his opinion. It is done perhaps every month in this State; that is nothing. That is the only authority they have brought here, and a mere glance shows it is not an authority on the contention they make here."

Mr. WATSON: "The case last cited by the counsel who addressed the Court, from Pennsylvania, was that of a medical expert in an indictment for murder, a thing which takes place in the North Carolina Courts often, and which has never been disputed. It has never been disputed in North Carolina in any Court I have heard of. And it is frequently the case on the border counties we have to bring in a lawyer from the State of Virginia, who proves himself to be an expert as to the laws of Virginia, to state what that law is in our courts. We sometimes have to bring him to prove the laws of Virginia and the rules of the courts of Virginia as facts in cases in North Carolina courts.

"In cases like this, for instance: A citizen of North Carolina is injured by a railroad in the State of Virginia, and

the charge is that he was injured by the negligence of the railroad; when the trial takes place in North Carolina, a lawyer from the State of Virginia may be brought here from Virginia to show the holdings of the Courts of Virginia in questions of negligence, and as to whether the doctrine of the last clear chance has been adopted in that State. But that is in a Court of North Carolina, where it is necessary to prove the law of a foreign State. I do not believe the counsel for the respondents can find a single authority justifying them in offering this testimony. The only reason why there is so little law on this subject, it is so rare it has never been argued before a Court that such testimony was competent. What would be the result if we were to establish this position in North Carolina? Why I could go before the Supreme Court and say it is true you decided ten years ago a certain way, but I have ten lawyers here, any one of whom is fit to adorn the Supreme Court Bench, to show that the opinion is erroneous. And in the case of a Justice of the Peace—he is judge of both law and fact—and their jurisdiction in a State like North Carolina in the trial of cases by them is about as important a jurisdiction as any officer in the State, because they have to decide a thousand cases to the higher courts having one. Suppose I say to the justice, you do not know the law, and then get a pair of lawyers and let them train with me until I had worked my case into their very muscles and tissues, and then go before the justice and say, I have here a pair of expert lawyers who desire to tell you what the law is. Is not that a monstrous proposition?

"I do not know but one precedent for it. That occurred in Iredell County, the county of my friend, Mr. Long. There was a lawyer up there who argued a case before an old magistrate. In doing so he announced a proposition of law, it sounded strange to the magistrate and he said so. The lawyer offered to swear to it. The book was produced and he swore. On this testimony the magistrate decided the case.

"The other side, however, did not rely so much upon it, and appealed, and when the case went on appeal to a higher court the decision was reversed; the fact of the lawyer's swearing to the proposition of law leaked out and came near ruining the old magistrate, who then wanted to prosecute the lawyer for perjury in swearing to a lie. I do not know whether my friend Long relied upon that precedent or not, when he summoned all these experts. But in all seriousness, I submit that this Court would become the laughing-stock of our profession in this land if it were to follow that precedent, and it were to go abroad that this Court was examining lawyers and taking their opinions as to what the law is, and as to whether the Supreme Court was honest in rendering an opinion. It seems to me that it is a proposition to take this Senate as an awkward squad and put it into the hands of a dozen lawyers to be taught the manual of arms. And the very fact that they come here and say they can not find an authority, ought to be sufficient to prevent our taking up time in discussing the question."

Mr. JARVIS: "If Judge MacRae had written a book on what constituted a claim against the State, would it not be competent to stand here and read the book to the Court?"

Mr. WATSON: "Yes, yes; but we would not summon him here to swear it was right."

Mr. JARVIS: "If it is competent to read what he had written in a book, tell me why it is not competent to have his sworn testimony as to what a claim is, for the benefit of the Court?"

Mr. WATSON: "Because as a Court we do not settle what the law is by the sworn testimony of lawyers; we do not settle it by the evidence of any one. It would be unwise to do it. As a leading judge said, experts in nine cases out of ten are auxiliary counsel for the side that summons them, any how. It is absolutely without precedent or foundation of law,

We have searched the books as diligently as we can and can find no authority for it in any Court."

Mr. JARVIS: "Do you think that an answer to my question?"

Mr. WATSON: "With all possible respect to him, I do not think the counsel understands his question."

Mr. JARVIS: "I am quite sure if you think that an answer, you do not."

Mr. GUTHRIE: "It occurs to me that the rules of practice in regard to petitions to rehear in our own Supreme Court would throw some light upon this subject. Every lawyer knows that a decision of the Supreme Court after it has been handed down, within a certain time is subject to the right of the attorney of the defeated party to file a petition to rehear; but the Court will not consider such a petition unless it is accompanied by the statement of two lawyers that they have examined the case and that there is error. There is no rule that the lawyers must swear to their certificate, and I imagine if there was such a requirement there would be few petitions to rehear; in fact the Court is not now in the habit of paying much attention to them. The respectable lawyers have been referred to years ago by Judge Reade as 'the amiable counsel who signed the petition.' I remember that twenty-five years ago Chief Justice Chase sat where you now sit holding the Federal Court. Some lawyer offered an affidavit in which his client swore that a certain thing was unlawful, and after reading the affidavit the Chief Justice turned and said, 'I want you to present my compliments to your client; and tell him he has settled by an affidavit a question of law which has twice been argued in the Supreme Court of the United States and where we still have it under an *advisari*, and that when I go back to Washington I will tell my associates that the law must be as your client says because he swore to it.' It strikes me that the law is as laid down by Mr. Busbee. That it is only to prove the law, and

not the applicability of it to the case being tried. If this were true, demurrers to complaints arising upon issues of law ought to be sworn to and the Court would be relieved of the legal investigation of the law, and it would depend upon the credibility of the witness as to how the Court decided the law."

Mr. F. H. BUSBEE: "It is unfortunate in that the exact position contended for by the respondents has never before been adjudicated. We endorse every single expression read from the text-books read by the counsel for the Managers. Certainly on the trial of no civil cause, before any legal tribunal, could expert evidence be introduced (except at the request of the Judge), to prove what the law is. So in this case, if any question of law shall arise incidentally—if the Court finds it necessary to pass upon any question of law in their decision of the case, evidence to prove the opinion of this or that man as to the law could not be received. But our position is put upon a totally different ground. You will search in vain for precedents (save one or two to which I call your attention), because this particular question has never before been submitted to an American tribunal since 1803 in an Ohio case; and as there is no record of that trial on record, we are unable to say whether this particular evidence was offered or not. This was a case in which Judges were impeached for declaring the law of the State to be unconstitutional. They were acquitted, and it is to be presumed they had the benefit of expert testimony. They were impeached before the Marbury decision, and both were acquitted. And if the case now on trial is to be accepted as a precedent hereafter, all judges will be impeached who declare any act of the Legislature unconstitutional, however gross the violation may be. I say you will find no authority upon the question. Why? Because no other tribunal has ever passed upon a decision of a Supreme Court, the highest Court of Appeals, and attempted to impeach the judges who de-

livered it. In the case of Pickering, some objection was made to some of his decisions, but the gravamen of the offense was his refusal to grant an appeal and the erroneous decision merely led up to this. Impeachment was for drunkenness and refusal to grant the appeal. It was alleged by way of inducement merely that his decision was wrong.

"Never before in any Commonwealth in the American Union have judges been impeached because of errors in their decisions. Why should we not be permitted generally to introduce evidence to establish the accuracy of the opinion? Simply because when that opinion is written it is the law, an authoritative declaration of the law, and binds every human being who comes under its jurisdiction. If a judge acts with gross error, if he acts with malice, if he acts with intent to oppress his fellow citizen, under most of the tribunals in this country he is free from prosecution in any tribunal. See case of *Yates v. Lansing,* 5 Johnson, and the cases following. The action of a judge upon the bench in the scope of his jurisdiction, can be called in question in one tribunal only, and that is by impeachment.

"Now, Mr. President, what is the question submitted to the Senate? Is it a question of law or of fact? It may become a question of fact. The contention of the Managers is that, notwithstanding the highest good faith, the highest learning, the highest integrity, if the Judges made one mistake, one error in the adjudication of the case before them they are guilty, because, as the merciless Managers declare, ignorance of the law excuses no man, and that the Judges are to be impeached if with the highest integrity and good faith they make a single error in their opinions. Our position is as far as the poles from theirs, but if that be the rule by which this tribunal is to be governed, it then becomes a question of fact whether the opinion in *White v. Auditor* is according to the law and the precedents. This question of law takes on a new shape. You can not convict a man of

error of law. It must be of fact, and the fact is the delivery of an opinion contrary to the law and the precedents. That then becomes a question of fact, upon which we are entitled to introduce expert testimony. Therefore you may look in vain for precedents. No Judges have been impeached for erroneous opinions before. No Judge, I say, since the Constitution was formed has been impeached for delivering an erroneous opinion. There was an impeachment for the refusal of an appeal in the Pickering case, as I have said, but never before has this particular question arisen in any court in America. It did not arise in Johnson's case. That was not a question of delivering an opinion. The question was indirectly involved whether the Executive had a right to pass upon a constitutional question, and had a right to act according to his own interpretation of the Constitution, or whether he should go to the Court for a construction. But that question does not arise here.

"Now what was the question of fact? The question of fact is, was the opinion in *White v. Auditor*, and the judgment, correct or not, according to the law and the precedents. Was it an intrusion upon the legislative domain? It would be a question of law until you make it a question of fact. Of course you must solve the question of law in arriving at the fact. But the question of fact is, did they encroach upon the legislative domain, and to arrive at the question of fact you have to go into the question of law. Therefore, if the Managers are right, we are trying a question of fact, for it can hardly be said that, whether or not the respondents made a mistake in a question of law, an honest mistake in a question of law, such as Judges make every day, it is not a question of fact. I know that the Superior Court Judges make these mistakes every day, and I think that the Supreme Court Judges also sometimes make them. But if a Judge makes a mistake in the deliverance of an opinion, can he be impeached? The doctrine laid down by the Managers is that

the Judges of a Court are impeachable if they make a mistake of law, if they issue a writ they have no constitutional right to issue. Now can we not be heard to say, with bated breath, and with all proper obeisance to the tribunal, that it is barely possible that the majority of the members of the House of Representatives might have been in error, and that eminent lawyers from all parts of the State believe, and are ready to testify that they do believe, the minority of the House was right on this question, and that the Judges had not committed error?

"If our view is right, before the Court can find the respondents guilty, they must find that the Judges acted with an evil mind; then can it be contended that we can not show as a fact, tending to prove good faith, that eminent lawyers from all over the State—men whose lives adorn the profession, men having no connection with this action, men from the county of Beaufort by the sea to Buncombe in the West, agree with the Judges in their action and say they were right. Would that not be a circumstance tending to show good faith? That all of these eminent lawyers, with no motive whatever, with nothing to gain, concur with them in their decision?

"In the Chase case a question arose as to the practice in certain courts. That was a question of law, and without objection Mr. Edward Lee was asked if he was acquainted with the criminal practice in Virginia, and after qualifying he proceeded to speak. And Philip Loard also testified.

"These Judges are accused of a violation of the Constitution and not of a violation of the criminal law. And it does seem to us we ought to be permitted to offer evidence upon the question of good faith."

Mr. OSBORNE: "At the outset of this argument, from your honor's intimation, it seemed to me that the majority, to your mind, was against us. I do not know if your honor has made up your mind about this question, because, if so,

I would not further touch upon the subject. In any other Court I know of in North Carolina this evidence would be incompetent. Now, in the first place, I do not think the gentlemen are treating us with due respect in saying we have not made a plausible argument. Why they put Judge Montgomery through a most severe cross-examination and asked him hypothetical questions and his opinions thereon. What right had they to get the opinions of a Judge on a question of law, and yet when we offer to put on gentlemen as to questions of law, object. What did their cross-examination mean? What had Judge Montgomery to witness? What had he to do with this case? You asked his opinion to show that these Judges had decided contrary to law; your examination was not proper. In view of that testimony, we ask to introduce testimony on our side of the question. There is something else in this matter. I admit that were the error so palpable as to strike the ordinary man that it is error, of a corrupt intent, as for instance a Judge in an assault and battery case refuses to admit the defendant to bail; of course in such a case the Managers would be right in claiming that the Judge was impeachable."

Senator MORRISON: "Do you think a Judge could plead error in his construction of the Constitution limiting his own power or error in a statute governing his own power as a Judge?"

Mr. OSBORNE: "Certainly. Do you know what a Judge's oath is? It is to do his duty to the best of his ability; that is his oath."

Mr. PRESIDENT: "The Statute 25, Second Volume of The Code, Section 2927, sub-division 4, provides that the presiding officer shall decide in the first instance, without a division, all questions of evidence and incidental questions. I am of the opinion that the presiding officer must decide questions of evidence and incidental questions according to

the established rules of law and evidence that prevail in the Courts of the State.

"On trials of impeachment the rules of evidence are the same as provided in criminal trials before the ordinary courts of law. *Eng. En. Law* (2 Ed.) Vol. 15, p. 1070; Hartsell's Precedents 153; Story on the Constitution, section 798; Cushing's Law and Practice of Legislative Assemblies, section 2569; *State v. Buckley,* 54 Ala., 599; *State v. Hastings,* 37 Neb., 96.

"Pearson, Chief Justice, said in *Hooper v. Moore,* 50 N. C., p. 132: 'What is the law of another State or of a foreign country is as much a 'question of law,' as what is the law of our own State. There is this difference, however: the Court is presumed to know judicially the public laws of our State, while in respect to private laws and the laws of other States and foreign countries this knowledge is not presumed.' This is familiar learning. 3 Woodson's Lec., 195. The Court takes judicial notice of and determines for itself the law. *Norman v. Ky. Board of Managers,* etc., 93 Ky.; *King's County v. Ferry,* 5 Wash., 536; *Rider v. Frither,* 94 Ohio St., 285; *Conrad v. Fisher,* 57 Mo. App., 352; *Simmons v. Mitchell,* 29 Fla., 179; *Osborne v. Blackburn,* 78 Wis., 209; *Inter-State Land Co. v. Maxwell,* 139 U. S., 569; *Hooper v. Moore,* 50 N. C., 132.

"I am of the opinion that expert evidence is never received for the purpose of enlightening the Court upon questions of law. It is the duty of the Court to take judicial notice of the Constitution and laws of the State and determine the law. This rule is recognized in the Courts of the United States and the Courts of the several States of the Union, and has been the universal practice in the Courts of North Carolina from the beginning of its history to the present time. I am of the opinion that the question asked is one of law. For the above reasons, and many others, I hold that

the expert evidence offered is incompetent, and sustain the objection."

Mr. JARVIS: "While we feel the greatest confidence in our proposition that the expert testimony offered is competent, and while I, speaking for myself, still think so, I believe I utter the opinions of my associates when I say I think it is competent. Still we will not ask for a division on this important question, not only on account of our deference to yourself and the honest effort I know you have made to arrive at a correct conclusion, but because of the further fact, suggested by the counsel on the other side, that the admission of this testimony would necessarily delay this trial. We will not, therefore, ask for a division or ask this witness any other question. He is on the stand, and if there are any Senators or Managers, or counsel for the Managers who desire to ask him any question, so far as we are concerned, they can do so."

W. J. MONTGOMERY, *a witness called in behalf of the respondents, is duly sworn, and testifies as follows*:

Examined.

By Mr. OSBORNE:

Q. How long have you known Judge David M. Furches? A. Forty-four years last January. I first met him when I went to Judge Pearson's law school forty-four years ago; he was the first man I met.

Q. Have you known him ever since? A. Yes, very well.

Q. How far have you lived from him since that time? A. Between twenty-five and thirty miles.

Q. In an adjoining county? A. Yes.

Q. Have you been much thrown with him in the practice of the law? A. Yes, I have appeared with him and against him.

Q. Did you know him on the bench of the Superior Court? A. I did.

Q. Did you practice before him at any time? A. Yes, I practiced before him and he before me.

Q. You exchanged courtesies? A. Yes; after he went out I came in.

Q. Do you know his general character? A. I do.

Q. What is it? A. As good as any man's.

Cross-examination waived.

H. C. JONES, *a witness called in behalf of the respondents, being duly sworn, testifies as follows*:

By Mr. OSBORNE:

Q. Do you know David M. Furches? A. I do.

Q. How long have you known him? A. I should say something like thirty-five or forty years. I have known him ever since he came to the bar; I do not know his age, but I think he came to the bar about the time I did. He was born in Davie County; I was born in Rowan.

Q. Do you think you know his general character? A. I do.

Q. What is it? A. It is good.

Cross-examination waived.

JOHN D. SHAW, *a witness called in behalf of the respondents, being duly sworn, testifies as follows*:

Examination.

By Mr. OSBORNE:

Q. Do you know Hon. David M. Furches? A. I do.

Q. How long have you known him? A. I have known him over forty years. I was with him at Pearson's law school.

Q. Have you had an opportunity of being well acquainted with him? A. Yes. I know him well.

Q. Do you know his general character? A. I do.

Q. What is it? A. It is good.

Cross-examination waived.

Mr. JARVIS: "We have now offered to the Court the evidence upon which we will rest the defence of the respondents."

Mr. WATSON: "We expect one witness to arrive to-night, and as we are approaching the hour of adjournment, and as the evidence of the respondents closed sooner than we expected it would, if it is in accordance with the wishes of the Senate, the Managers would be glad if the Court would adjourn. We will not take up much time to-morrow. We do not think we will take more than two hours to-morrow."

Senator MORTON: "In deference to the wishes of the counsel, and to bring the matter before the Senate, I move that we adjourn until to-morrow morning."

Senator AYCOCK: "I hope that the examination will proceed."

(The President puts the motion and it is lost.)

B. R. LACY *is recalled in behalf of the Managers.*

Mr. WATSON: Q. State what office you hold? A. I am State Treasurer.

Q. Are you as State Treasurer custodian of the fund derived from the oyster tax? A. Yes.

Q. Can you turn to the books and say what the amount of the fund was when White's claim was paid last fall? A. I can.

Q. Does that book show the date and the amount of the payment to Theophilus White last October? A. The book behind me here does.

Q. Please turn to that? What was the date and what was the amount of the White payment? A. October 22nd, 1900; the amount, $831.15.

Q. What amount of money was in the Treasury to the credit of that fund at that time?

Mr. OSBORNE: "That is what we object to."

Mr. WATSON: "Our proposition is this: that a part of the defence is based upon the proposition that there was money in the hands of the Treasury belonging to the Shell-Fish Fund more than sufficient to pay the judgment of the Court, and to satisfy this writ issued in the nature of an execution. We think it is proper in this connection to show that there was not enough money to pay it, and that it was necessary to take funds out of the Treasury to pay it."

The PRESIDENT: "I think that would affect the parties who made the agreement as to the facts."

Mr. WATSON: "That was an agreement of facts before Starbuck where the only claim was for services and incidentals, from the 15th of March, 1899, to the 20th of November, 1899; the agreement only related to that sum, but the Court, when they came along the next fall to pass upon the question, assumed there were still moneys belonging to the Shell-Fish Commission sufficient to satisfy a much larger judgment, and they, without investigating the matter, issued the peremptory writ in October. They did not investigate to ascertain if the same state of facts existed."

Mr. F. H. BUSBEE: "We also object on the ground that this is new matter, not responsive to any of the evidence introduced by the respondents; besides all this was gone over in the examination of the Auditor; that would be a valid objection. But it is absolutely new matter, and is not introduced in rebuttal; certainly there are no allegations in the Articles of over-payment by the Treasurer. In no event would it be permissible to prove a violation of duty by the Treasurer in regard to his manner of obeying the writ. The Court will remember that the statement of facts admitted an amount in the Treasury to pay the larger salary of nine hundred instead of the four hundred. It is new matter, and it

is utterly incompetent to show the manner in which the Treasurer obeyed the writ."

Mr. WATSON: "We have examined the respondents in regard to this matter as to whether they investigated the question before issuing the writ. And questions were put by Senators to the respondents such as, Why did you not order a reference to ascertain if the Treasury was still in that condition and able to pay a larger salary, but for a shorter time and consequently a smaller amount of money, than the facts before Judge Starbuck showed. We propose to show now that they made no inquiry."

The PRESIDENT: "I understood the respondents admitted that fact."

Mr. WATSON: "And that being so, that they absolutely issued a writ to pay which it was absolutely necessary to take general funds out of the Treasury."

Mr. C. M. BUSBEE: "We were permitted to show by the Auditor, with the vouchers in his hands, that these accounts or claims of White were not duly proven and certified before the Auditor, who was acting in obedience to the writ of mandamus; we now propose to show a fact which is upon all-fours with the evidence of the Auditor, that the Treasurer, acting upon this writ of mandamus, which resembled a blanket insurance policy, was compelled to pay money out of the Treasury not belonging to the oyster fund; that in order to obey the writ of mandamus coming from the Supreme Court of North Carolina to him, he had to put his hands in the Treasury outside of the oyster fund. That this was a consequence flowing from the action of the Court in issuing the writ. I say that was the precise question presented the other day when the question was as to the admissibility of the testimony of the Auditor in respect to the manner of the certification of the claims by this Inspector or Shell-Fish Commissioner, whichever he may be under the decisions of the Court."

The PRESIDENT: "That was on the ground that it was alleged in the Articles of Impeachment and they admitted it. This is a matter which affects the Treasurer and not the respondents in my judgment. I will have to sustain the objection."

(Witness is now tendered for cross-examination and cross-examination is waived.)

The hour of adjournment having arrived, the Court adjourns until to-morrow morning at 10 o'clock.

The Sergeant-at-Arms makes proclamation accordingly.

ELEVENTH DAY.

THE SENATE CHAMBER,
RALEIGH, N. C., Thursday, March 21, 1901.

Court met pursuant to adjournment at 10 o'clock a. m., and was called to order by the Sergeant-at-Arms.

The Sergeant-at-Arms makes due announcement of the convening of Court.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsey, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller, of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard.

The PRESIDENT: "If there is no objection, the reading of the Journal will be dispensed with."

WALTER CLARK, *a witness called in behalf of the Managers, being duly sworn, deposes as follows:*

Examined.

By Mr. DAVIDSON:

Q. State what position you occupy? A Justice of the Supreme Court.

Q. How often have you occupied that position? A. I was first appointed in November, 1889, by Gov. Fowle, and I have occupied it since.

Q. Whom did you succeed? A. Judge Merrimon was appointed Chief Justice, and I was appointed to succeed him. The following year I was nominated and elected. It was afterwards held that it was for an unexpired term, and I was re-elected in '94 for the present term, eight years.

Q. Prior to that time, did you occupy any position in the State? A. I was Superior Court Judge from the 15th of April, 1885, and was in that position when appointed to the Supreme Court bench.

Q. By whom was that appointment made? A. By Gov. Scales.

Q. Will you state whether or not you were a member of the Court, and took part in the deliberation and discussion of the question of office-holding cases, beginning with the 120th N. C., and coming down practically to the present time? A. I have taken part in every decision of the Court since I have been there, except those on which I did not sit for personal reasons.

Q. In all these cases you sat? A. Yes, sir.

Q. Took part in the deliberations? A. Yes, sir.

Q. Do you recollect the facts connected with the issuing

of the mandamus directed to the Treasurer and to the Auditor in the case of *White v. Auditor?* A. I think I recall most of them—all of the material ones, I think I do.

Q. Will you state them, with all the circumstances connected with them, as they appeared to you as one of the Judges of the Court? A. The first time the case came to my knowledge, it was docketed in our Court, I think, about the 12th of December, 1899, and a motion was made that day, or soon thereafter, to advance it as a matter of public interest, to be heard under Rule 14. It was advanced, and argument heard on the 19th. The case was argued by Mr. F. H. Busbee on one side, and Mr. Loge Harris on the other. There was no point raised in the argument as to the mandamus. The sole matter discussed before us was as to the amount recovered. When the case came up in conference, either that evening or the next day, the other Judges said it was merely a question of how much should be paid. When they got through, I told them that they were mistaken—that there was the biggest point in that case that had ever come before our Court—the power to issue mandamus against the Treasury, contrary to an act of the Legislature. Judge Faircloth remarked, "The counsel raised no point of that kind." I said they did not, but it was my duty to raise it. I was sworn to support the Constitution, and I thought this was a most serious violation of it. We five men have recently decided in *Garner v. Worth,* that this Court can not issue a mandamus to the State Treasurer, and now you ask to let this go without saying anything about it. It was not decided, but went over to the next term. The next term it was discussed considerably, opinions were written, counter-opinions, and finally, on the 22d of May, the opinion was filed. There was no mandamus issued, there was simply an opinion which speaks for itself, and is printed in the books. Soon after the Court met on the 24th of September, or thereabouts, Mr. Loge Harris came into Court and moved for a mandamus.

He said the money was still unpaid, and he wanted a mandamus on the Treasurer to pay it. There was some colloquy between him and the Court, and finally the Chief Justice, I think, asked if he had served notice on the other side. He said he had not, and the Clerk was sent for, who stated he had not issued a mandamus. Then Judge Faircloth said notice had not been served; that we could not grant it to him. I think Judge Montgomery replied to him, "You ought to apply to the Clerk." The Clerk was sent for. Mr. Harris came back on the 9th of October, and when he came back, Mr. Cook sat beside him, and Mr. Harris said he had served notice, and the counsel on the other side, Mr. Cook, was present, and he again applied for a mandamus. The Court, after some talk among themselves, I do not remember exactly the conversation, asked him if he had filed affidavits. He said he had not thought it was necessary, Mr. Cook being present; that the money had not been paid, and no mandamus had issued, and he wanted a mandamus. He was told that as there were no affidavits filed, it would not be issued, and he did not get his mandamus. About Thursday, as we adjourned at dinner time, Col. Kenan, the Clerk, met me at the door and said, "I shall have to issue that mandamus?" I said, "Colonel, it has been refused by the Court twice. I do not think you ought to do it without authority of the Court." He said, "The other Judges say I ought to do it," and I said, "Col. Kenan, it is a very serious matter, and before you do it, you ought to go to the Court and ask the Court about it." The argument for that District closed Thursday at 1 o'clock. So we met in conference on Friday morning, instead of afternoon, and while we were in conference, Col. Kenan came in, and said, as near as I can recollect, that he was very much embarrassed by the difference of opinion between the Judges, that some thought he ought to issue the mandamus and I thought he ought not, and he simply wanted to know his duty. He was in the service of

the Court, and would do whatever it wanted him to do. Finally he polled the Court. Judge Douglas was, as far as I remember, rather non-committal. Judge Montgomery was the same. He asked Judge Furches, who told him it was his duty to issue it. He asked me, and I said, "Colonel, you know my views already." He asked Judge Faircloth, and he said, "As an individual, Colonel, I tell you you ought to issue it, but as a Judge, I express no opinion." He then turned again to Judge Douglas, and my recollection is that Judge Douglas then used the same language that Judge Faircloth had. Col. Kenan said, "I do not know what to do." Finally, they had some further conversation, but Col. Kenan seemed to be satisfied. He went out, and when we adjourned he was out there. I said to him, "Col. Kenan, what are you going to do?" He said, "Judge, I will have to issue the mandamus." I said, "They did not tell you so." He said, "I think they did." I said, "You had better be prudent about this matter, and before you do anything, give me time to write a dissenting opinion, and send it down to you." That was Friday afternoon. I was under the impression I wrote it that night, but I find it was in the afternoon. I telephoned down for George, our messenger, and sent the dissent and protest down by him about 6 o'clock that afternoon. About 8 o'clock, the telephone bell rang, and Col. Kenan called me up, and he said, "Judge, there is no use sending that opinion, I will not issue the mandamus without a written order." I said, "Col. Kenan, it is an important matter and I prefer that you should send them around." On the next morning, as well as I recollect, I think it was Saturday, it may have been Monday, when I went in the Library. Senator Jarvis was present. I called him in the consultation room, and narrated to him, as well as I remembered, what had happened in the court-room, that is, that Col. Kenan had applied for instructions, I had sent in a protest—shall I go on?

Mr. JARVIS: "Do you think it is proper to detail a private conversation between you and me?"

Justice CLARK: "Certainly not, if you object."

Mr. JARVIS: "I do not object on my own account, but I do object to your detailing any private conversation."

WITNESS: "It is only because I have sworn to tell the truth and the whole truth."

Mr. Manager CRAIG: "I remind the gentleman that a private conversation between the Governor of North Carolina and Judge Montgomery was told on yesterday."

The PRESIDENT: "I sustain the objection."

WITNESS: The next I heard about that matter, as I remember now, was on Tuesday afternoon, when we met to file opinions. I think we had just begun to file opinions when Col. Kenan came in with a paper in his hands, and he said he came about that matter. He wished to do his duty, and he wished to know what that was. He finally polled the Court again. Judge Douglas told him it was his duty to issue. He asked Judge Montgomery, and Judge Montgomery used this expression: He said, "I am bound to tell you, Colonel, you have no constitutional power to issue the writ." Judge Furches said, "I have told you before it is your duty to issue it." I said, "You have my views." The Chief Justice said, "I think it is your duty to issue it." And that is the last I know of the issuance of the writ. This was Tuesday afternoon, the 16th.

Q. What occurred, either in that conference when these respondents were present, in respect to your protest, and dissenting opinion, if anything? I ask you if you remember any expression of either one of the Judges, and especially of Judge Montgomery, after the Court was polled, and it was ascertained that a majority of the Court asked the writ to issue? A. Just before Col. Kenan came in, Judge Montgomery said to the gentlemen on the opposite side of the table, "Gentlemen, I am bound to tell Col. Kenan he has no

power to issue this writ. You gentlemen have a political party behind you. I have nobody behind me." After Col. Kenan went out, I offered my dissenting opinion. I said, "Gentlemen, you have read my dissenting opinion and protest, and I would like to file it." Objection was made. Judge Furches objected that there were some recitals in the dissenting opinion as to the tenor of the mandamus, and he remarked that he and Judge Faircloth had prepared the mandamus. They also objected to my recital that they had not ordered Col. Kenan to issue the writ. I said, I would strike that out. I sat down and started to strike it out, when we got into a discussion of some cases we were deciding, and I found it would take too much time to do it then. I said, "I will take it home," and on the following Tuesday, the 23d, I brought it in, and said, "I have stricken out that part about the Clerk. I hope it is not objectionable now." Judge Furches said, "It is all objectionable to me." I said, "Do you refuse to let me file it?" Judge Montgomery spoke up and said, "So far as I am concerned, I refuse to let it be filed. There have been too many dissenting opinions in these political cases, and I want to see the end of them. I hope it is the last of them."

Q. What parts were stricken out of that dissenting opinion? A. It was originally written when Col. Kenan was about to issue the writ, and I protested and dissented upon two grounds, in the first place, that the Clerk had not been explicitly directed to issue it, and therefore had no power; and farther, if he had been so directed, the Court had no power to order it. I struck out that part of the opinion which said that he was not instructed, leaving that part which said the Court had no power to do so. Then I insisted I had as much right to express my opinion in a decision as any of them, but the other four Judges refused to let the dissent be filed. Judge Douglas, I remember, said, "Let it go in the obituary column." I said it might suit the obituary column, but it is not in my funeral.

Q. Have you seen a copy of your opinion filed here in evidence? A. Not since it has been filed in this proceeding.

Q. Did you furnish one to Col. Kenan? A. The original was written in manuscript and sent to Col. Kenan, and, according to the custom of the Court, was copied and sent around to the five Judges. That is the custom—I presume it was done. And after they refused to let me file the dissenting opinion, I said, "If you will not let me file my opinion, let me have my copy back," which is the usual course, when for any reason an opinion is not filed. Judge Montgomery threw me his; Judge Douglas did not have his there; Judge Faircloth said he did not have his, and Judge Furches said, "There has been so much fuss about this matter, if you have no objection, I will keep mine." I said, "None in the world."

Q. Upon which of these typewritten copies were the erasures made? A. In mine. This is always the case when a Judge makes corrections. There are very few opinions filed without corrections. Sometimes one-half would be stricken out, sometimes only a word or two.

Q. Is the copy upon which you made the erasures the one that is filed here? A. Yes, sir; that is the one I offered to the Court, and that is the one they refused to let me file.

Q. Will you state whether or not in any of these conferences the question was raised and discussed by the Judges, and if so, what was said and done with respect to the form the writ ought to take, if issued at all, whether an alternative or imperative mandamus? A. On that occasion, after Col. Kenan went out, I said this to the Court: I said, "Gentlemen, I do not want you all to get in any trouble, and if you will allow me to make a suggestion, I should say this: Pursue the usual course, and issue an alternative mandamus, which is simply an order to the Treasurer to pay, or show cause; that I would not file any dissenting opinion to that." I was

bound to enter a formal dissent, because I did not think they could issue an alternative mandamus to the Treasurer, but would write no dissenting opinion; that Mr. Worth would probably return it, saying he could not pay it, because forbidden by the General Asseembly, if so, he would return it to the present term of the Court; that if the Legislature acquiesced in the views of the Court, they would repeal the act forbidding payment, and relieve the situation, but if the Legislature stood to their views, I was certain that Mr. Lacy, the new Treasurer, would not pay it, and then we could retire with dignity, and there would be no clash between the two Departments.

Q. What was said, if anything? A. They said the matter had been fussed over enough, and they thought the man ought to have his money.

Q. Was that before the writ was actually issued? A. Yes, sir; just as soon as Col. Kenan went out.

Q. Will you explain for the benefit of the laymen of this Court, as well as for some others, the difference between an alternative and a peremptory writ of mandamus?

Mr. COOK: "I object to that testimony."

The PRESIDENT: "It is a question of law. You object when they offered to prove it."

Mr. DAVIDSON: "If the gentlemen object, we will withdraw it."

Q. What is the ordinary practice of the Court, Judge Clark, with respect to the enforcement of an opinion of the Supreme Court?

Mr. COOK: "We object to that evidence."

Mr. WATSON: "We will withdraw it. I will say you asked for those questions from the other Judges, as that record will show."

The PRESIDENT: "We have passed that; they have withdrawn it. Go ahead."

Q. Did you ever have any interview with Treasurer Worth on this subject? A. Yes, sir.

Q. State when it was, where it was, and how it was brought about?

Mr. OSBORNE: "I do not see what bearing any conversation that Judge Clark had anywhere, unless it was in the presence of these respondents, has on this case."

The PRESIDENT: "There is evidence here that this conversation was communicated to these Judges."

Mr. OSBORNE: "I am objecting to anything that passed between Judge Clark and Mr. Worth down here in his room, when neither of those respondents were present. It might affect the witness, but it does not affect these gentlemen."

The PRESIDENT: "That would be ordinarily true, but in this case, there is a great deal said by the respondents about a conversation Judge Clark had with the Treasurer, and that was communicated to them by Judge Montgomery."

Mr. OSBORNE: "Judge Montgomery said this passed in the conference. Of course there could be no objection to anything that passed in the conference."

The PRESIDENT: "I think I will overrule that objection."

A. I was passing through the Capitol going home one day, I do not remember the exact time, in the summer, I was passing through, and Mr. Worth, asked me to come in. I went in, and we had a little conversation. He said to me, "You fellows over yonder have got me in a fix, ordering me to pay this money."

Q. By Mr. OSBORNE: Did you ever state what passed between you and the Treasurer to the Judges? A. I did not.

Mr. OSBORNE: "Now, may it please your Honor, what bearing does that have on this case?"

Mr. WATSON: "Mr. President, one of the respondents

testified in his own behalf as to a conversation had between Judge Montgomery and Judge Clark, in which he said to Judge Clark that 'Mr. Worth, the Treasurer, says that you came in and told him not to issue the writ, and threatened him if he did.' And then Judge Montgomery came upon the stand and they called out from him a conversation, not in the presence of Judge Clark, but they called out a conversation had on the street between Judge Montgomery and Mr. Worth, in the presence of Governor Russell, and that was admitted yesterday and proved, in which Judge Montgomery puts a statement before this Court that he, Judge Clark, went to the Treasurer voluntarily, and notified him not to obey the orders of the Court. Now, is it possible that with that testimony out before this Court, that the respondents come up here and object to our giving the true state of affairs, which is what he did say to Mr. Worth and what Mr. Worth said to him, and what was discussed by the members of the Court in the conference that afternoon. Is it possible that we are to be cut off with that declaration made in the absence of Judge Clark? Let him explain what words passed with regard to this matter."

Mr. COOK: "The testimony of Judge Montgomery was not objected to in that particular to which he refers. If it had been objected to, I think I can say with confidence, Mr. President, that you would have declared that it was inadmissible until it had been brought to the attention of the respondents. It was afterwards testified to by more than one of these Judges; in fact, I believe the one who first brought it out as a witness upon the stand, testified that that conversation was communicated to Judge Clark in the presence of these respondents, and then Judge Clark had the opportunity to make his explanation and his denial in respect thereto, and that he did do it. Now, what we submit, Mr. President, is this: Judge Clark may testify to anything that occurred when they communicated to him this information which

Judge Montgomery derived from a conversation in the street, from the Treasurer of the State, in the presence of the Governor of the State. I say we have gone into it, it was competent for us to go into it; it was competent for Judge Montgomery to say that he notified Judge Clark in the presence of these respondents that he had this information, and the source from which he derived it. If they had objected to it in the first place, because we did not connect him with it, and had not made it competent by the specifications above; but they did not, and we afterwards made it competent. It was not what was said on the street, to Judge Montgomery, that made it competent, it was what Judge Montgomery communicated to Judge Clark that was competent, and that would have been competent whether he ever heard it or not. It did not make a bit of difference whether the Treasurer ever said it or not, it is what he communicated to these respondents, and what he said, that is competent. Now, they do not propose to elicit from Judge Clark what occurred in that conference, and what was said in respect to this transaction in the presence of these respondents, but they propose to ask Judge Clark what occurred between him and the Treasurer. Now, as little dangerous as this question may be, because I do not know what the answer may be, but I do protest as one of the counsel for these respondents that we are not here to be tried by any conversation that occurred between Judge Clark and anybody else. I say in all reverence that I pray, in God's name, that these respondents may not be tried by anything that Judge Clark has said, or anybody else has said. We are here to answer to this high Court of Impeachment for what we have done upon the information we had, and not for what Judge Clark said to anybody, or what he said at all."

Mr. OSBORNE: "I will call your Honor's attention to what transpired a few minutes ago, when Judge Clark refused to state a conversation between himself and Gov. Jar-

vis. We objected to it, and your Honor promptly ruled it out. Why? Because it had no effect on the respondents whatever. Now, what is the distinction between the two? Of course no one doubts the propriety of your Honor's ruling. It is a conversation that purports to have taken place between Judge Clark and the Treasurer. Now, it is not material to these respondents whether any conversation took place, or what that conversation was unless—what? Unless it is brought into the council room, and told in their presence. What passed there is competent. And even if there was no conversation, even if nothing had taken place down in the Treasurer's office, yet if somebody said in their presence that conversation had taken place, and if it was absolutely false, and Judge Clark had never gone there, it does not make any difference. It is just what transpires in the presence of these gentlemen that is competent. I need not pause here to call your Honor's attention to the fact that whatever was said was admitted without objection on their part. That they have admitted incompetent evidence, in no way binds us to admit incompetent evidence. Now, why did we introduce it? We said to Judge Montgomery, 'Please state what passed between you and the Judges with reference to Judge Clark's conversation with the Treasurer,' and he states it. Now, that is in the presence of the Judges. That is brought home to them. Now, go a little further—why did we have a right to that question? Why, because it might throw some light on the motive of these Judges in making their decision in this matter, and what passed in the conference is certainly competent in that light. But what passed down in the Treasurer's office can throw no light on that question whatever."

The PRESIDENT: "I think it is competent."

Mr. DAVIDSON: "Proceed with your statement."

The WITNESS: He said, "You fellows over there have got me in a predicament, or trouble. You all say I ought

to pay this money, and the Legislature says I ought not, and what am I to do about it?" I said, "Doctor, if you read my dissenting opinion, I have already told you." He said, "I reckon I have got to obey the Court." I said, "Yes; when the Court acts within its jurisdiction you must obey them, and when the Legislature acts within its jurisdiction, you must obey them." I said, "Suppose a Magistrate would ask you to hang a man, what would you do?" He said, "That is a criminal case." I said, "Suppose a Magistrate would direct an officer to put out a man in an action of ejectment." He said, "Of course he could not do that."

Mr. COOK: "I ask your Honor if you think it is fair to these respondents for him to sit there and make an argument in favor of themselves. That is exactly what he is doing."

The PRESIDENT: "You brought it out in your defense yesterday, on the testimony of Judge Montgomery, and Judge Montgomery also stated that he gave notice of this to these respondents before the issuing of this writ."

"The WITNESS: He said, "If I do not obey the Court, they will put me in jail." I said, "They would not dare to do that." He said, "Suppose they do." I said, "Well, if they do, there will be three vacant seats after the Legislature meets." He did not think that would make matters straight for him, but I left him with the impression he would not issue the writ. The next I heard of this matter was in that conference with Judge Montgomery.

Q. What was said then? A. The next time I heard of this matter, I remarked to Dr. Worth at the time, I said, "Doctor, this is a private conversation, I understand." He said he understood it so, and I never expected to hear anything of it. The next I heard was in the conference room. Judge Montgomery said I had threatened Dr. Worth and told him not to obey it, and he said he would obey it. He said Dr. Worth said I went there and threatened him. I

said, "That is not true." I did tell Dr. Worth he had no right to obey the writ, but I did not go there and threaten him.

Q. Was anything said in that conference about the three vacant seats? A. No, sir; nothing of that kind was said. What Judge Montgomery said was that Dr. Worth had told him I had thretaened him; that if he obeyed this writ, he would be put in jail,or something of that kind,but that Worth would obey the writ if issued. I do not think anything was said about vacant seats. I do not remember the exact language Judge Montgomery used. I remember he brought out the conversation, and I denied having gone of my own accord, and having threatened. I do not remember his exact language.

Q. What was the character of the conversation—discussions in that conference. Was it acrimonious, bitter or sharp?

(Objected to. Objection sustained.)

The PRESIDENT: "That would be objectionable. State what occurred, what was said and done."

Q. State whether, as a matter of fact, any temper was shown by any one? A. There was some warmth shown, naturally, in a matter of that importance. I think I have stated substantially what happened on Tuesday. The first day (Friday) Colonel Kenan came in, I remember this happened which I have not stated. I think it was after Colonel Kenan went out. Judge Montgomery had not committed himself, and I said, "Judge, what do you think about the matter?" This was Friday morning after Colonel Kenan left, I think. I said to him, "What is your opinion about the matter." He flew off the helve, and in an excited manner, said to me, "I defy you, sir." I said, "What are you defying me for?" He said, "You are trying to put me on record." I said, "I do not seem to be doing it very fast." That is about what passed.

Q. In connection with the Clerk's application for advice, and after the Judges had delivered their opinion, did you hear any such expression there from any one of the Judges as this: "That settles it." A. Yes, sir. Judge Montgomery did say that to Colonel Kenan. That was Tuesday afternoon, when he came in the second time, and got explicit directions. Judge Montgomery said, "That settles it."

Q. Was the Court in session at that time? A. Yes, sir. Not in open court, but we were in session at the table where we deliver all our opinions, and make our orders.

Q. What subjects were you then discussing? A. Colonel Kenan had just taken the vote of the Court, and when the Chief Justice voted, that made three to two, and Judge Montgomery said, "That settles it."

Cross-Examined.

By Mr. OSBORNE:

Q. As I understand you, after the opinion was filed on the 22d of May, in *White v. The Auditor,* nothing passed in the Court with reference to the mandamus until Mr. Harris came in? A. I have no recollection of its being mentioned.

Q. The opinion had been placed behind you, and the dissenting opinion had been filed, in which you stated your grounds for differing from the Court? A. Yes, sir.

Q. Now, when Mr. Harris came in, is this what you testified to before the committee?

(Counsel hands paper to witness, who examines it.)

A. Yes, sir; that is what I testified to.

Q. Mr. Harris came in and notified you gentlemen in the shape of a verbal motion? A. Yes, sir.

Q. That the debt had not been paid? A. Yes, sir.

Q. And then it was that the Court and these respondents sent for the Clerk? A. Yes, sir; he was sent for.

Q. The Clerk then was sent for, and asked if he had issued the mandamus? A. Yes, sir; that is my recollection.

Q. In other words, the Court, and you among the number, did not know anything about it until you got the information from the Clerk? A. I do not know what the other gentlemen knew. I knew the mandamus had not issued. I do not say they knew anything about it. I do not know as to that.

Q. As I understand it, Judge Furches went on home after the Court adjourned in the spring? A. He went home before the Court adjourned.

Q. And he left three of you gentlemen here writing opinions? A. He left three of us here, one writing opinions.

Q. Who were they? A. Judge Montgomery, Judge Douglas and myself. We were a quorum of the Court.

Q. Do you remember when Judge Furches got back? A. At the Fall Term.

Re-Direct.

Mr. DAVIDSON: "If the Court pleases, we desire to ask Judge Clark one question which we ought properly to have asked in the direct examination, but overlooked it."

The PRESIDENT: "Very well. Proceed."

Q. Were you examined before the Committee of the House primarily upon this question? A. Yes, sir.

Q. Were you sworn? A. Yes, sir.

Q. Do you remember your oath? A. The same that was administered to me just now.

Stand aside.

W. R. ALLEN, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination.

By Mr. WATSON:

Q. You are a member of the Judiciary Committee of the House, that took this examination, upon which you reported

facts to the House? A. Yes, sir. I was a member of the Committee, and Chairman of the sub-committee.

Q. Who were the members? A. Judge Connor, Judge Graham, Mr. Craig, Mr. Spainhour, and myself.

Q. Did you administer the oath to Judge Montgomery? A. I did.

Q. And to all the others? A. Yes, sir.

Q. What was the form of that oath? A. My distinct recollection is, that the same oath was administered to all of the witnesses, and that the oath administered to Judge Montgomery was to tell the truth, the whole truth, in regard to the impending legislation in regard to the impeachment.

Mr. WATSON: "I do not know whether this is in evidence or not."

Mr. OSBORNE: "I have never had any evidence of it."

Mr. WATSON: "We want to offer in evidence the testimony of Judge Montgomery before that Committee, which he admitted here yesterday was properly printed."

Mr. OSBORNE: "I do not see how that is competent."

Mr. WATSON: "The evidence before the sub-committee that I examined him on yesterday, and he said he had revised it before it was printed."

Mr. OSBORNE: "May it please your Honor, I do not object to his calling Judge Montgomery and examining him as long as he pleases. But he never handed him that paper up there, and asked him if that was the evidence he gave before the Committee. He asked him a very simple question, as to whether he had revised the evidence which was taken before. He said he had. There is nothing here before the Court to show that that is the evidence."

Mr. WATSON: "If the Court please, I handed him this printed copy, and he said these answers were only answers to questions, that he did not pretend to tell all he knew to the Committee, but these were the answers to the specific ques-

tions put by the Committee, and that he was not sworn to tell all he knew."

The PRESIDENT: "I so understood him."

Mr. COOK: "I put it on this ground: If there is an attempt to impeach him, by what he said in that testimony, they must ask him if he did not so state, that he may have an opportunity of explaining. That is the rule in *State v. Patterson*. We submit, in justice to Judge Montgomery, and as your Honor is ruling out expert testimony here, that they can not be governed by rules of law as in criminal cases. And if they are attempting to impeach Judge Montgomery by this course, as they say they are, then they must call his attention to it, that he might have the opportunity of explaining it."

The PRESIDENT: "If that is the evidence revised by Judge Montgomery, and identified by him, that would be competent."

Mr. JARVIS: "There is no evidence that this paper was handed him."

The PRESIDENT: "No, I do not know about this paper. I know he swore to that."

Mr. WATSON: "This is a copy of that evidence in this case, ordered to be printed. I do not want to be put in the position of trying to contradict Judge Montgomery improperly. We offered to Judge Montgomery this printed copy, and asked him if he did not take it and revise it, and if this was not the revised copy of his testimony. They are all alike—every Senator has one in his desk, each member of the counsel has one, as part of our printed record."

Mr. OSBORNE: "It is not part of the printed record in this case."

Mr. WATSON: "It is a part of the written record in this case, by order of the Court, to be bound as part of the record in this trial."

Mr. JARVIS: "The evidence taken before the House is to be made a part of this case?"

Mr. WATSON: "As a matter of course."

The PRESIDENT: "Judge Montgomery swore that he revised his evidence before the Committee, and that as revised, it was published. Now, that, I say, is competent."

Mr. WATSON: "I asked Judge Allen the question if this is a true copy of this revised testimony of Judge Montgomery. I understood him to say yes, and upon that I offered it in evidence."

WITNESS: "I would like to state with reference to that revision, that we adopted in the sub-committee the same rule with reference to Judge Montgomery that we adopted with reference to the other witnesses, in order that they might not be misunderstood. After the evidence was taken down by the stenographer and typewritten, we permitted each one of the witnesses to take the evidence, and see if the stenographer and typewriter had made any mistake in taking down the evidence. Judge Montgomery was mistaken yesterday, if I understood him correctly, in saying that Judge Connor and myself revised his evidence with him. It was Judge Connor, and not myself. I was not with him. Judge Connor and Judge Montgomery sat together, and Judge Montgomery went over the evidence as typewritten, and made some changes, and corrected it. And the printed copy there is the correct copy of Judge Montgomery's testimony as revised by him. And I so understood Judge Montgomery to say."

The PRESIDENT: "I will admit it, only Judge Montgomery's evidence. The other part will be excluded."

Mr. WATSON: "That is all we offer, Judge Montgomery's testimony as printed in this record. And I asked him the question if this was his testimony."

EXHIBIT "L."

Examination of Justice Montgomery by Mr. Allen before the sub-committee of the House Committee on Judiciary:

"Q. Do you remember after the opinion was filed in the case of Theophilus White against Hal W. Ayer, Auditor, what application was made to the Court in regard to the matter?

"A. I think I do. One day shortly after Court convened, Col. Loge Harris came in and made application for mandamus in the matter. One of the Judges saw that it was not in proper shape, that it was irregular, and told him to go before the Clerk and see what he would do. Shortly after that Colonel Kenan came before the Court and asked what he must do about the matter. Nothing was done about it the first day that he matter was discussed, but on the second day when it was discussed, Judges Faircloth, Furches and Douglas said that the Clerk ought to issue the writ. I said: 'Colonel, my dissent expresses my view, and I do not care to be dragged into the matter, but I do not think you ought to issue the writ.'

"Q. Did the three Judges direct that the writ should issue?

"A. I do not think that they ordered it done, but told him they thought he ought to do it.

"Q. Do you remember the day the writ issued?

"A. No; I do not remember the exact day, though I think it was some time in October.

"Q. Do you remember whether there was any communication made to the Treasurer as to whether he would obey the writ?

"A. I do not know of any such thing. I remember the very night after Judge Clark's dissenting opinion appeared, just about dark, I saw before me, a short distance away, Governor Russell and Mr. Worth. They were walking slowly, and I overtook them, and we began to discuss the matter. Mr. Worth told me about some talk that he had had with Judge Clark. I asked him what he was going to do about the matter, and he replied that he would have to follow the mandate of the Supreme Court.

"Q. Was that conversation repeated to the members of the Court by you?

"A. No; it was not. Have no recollection of repeating it to them at all. Upon reflection, I may have mentioned the matter in the presence of the Judges.

"Q. Do you know whether they knew what Worth was going to do or not?

"A. I do not.

"Q. Did you see the writ?

"A. No.

"Q. Did you ever see it?

"A. I do not think I did. The first time I ever knew anything about it was when Colonel Kenan came into Court and asked what he must do about it.

"Q. Was anything said in the conference about it?

"A. I do not remember it.

"Q. You have seen the entry on the docket by Colonel Kenan?

"A. Yes; and I think it is correct.

"Q. Did Mr. Harris ever show you any verified papers on which to base his mandamus?

"A. I do not know that he did.

"Q. Did the Auditor appear by counsel?

"A. I do not know.

"Q. Did not some question arise about there not being sufficient notice?

"A. I think so.

"Q. Was this request made in open Court?

"A. Yes; motions were made by Colonel Harris while we were on the bench.

"Q. If Colonel Kenan refused to issue the writ would he have been considered guilty of contempt?

"A. I do not think so. I thought he was coming for instructions, for he did not seem to know just what to do. He simply wanted to get the opinion of the Court.

"Q. Had not the order been made by Judge Starbuck?

"A. Yes.

"Q. How long was the conversation before the issuing the writ?

"A. Just after Judge Clark had delivered his dissenting opinion. I had the conversation with Mr. Worth long before the mandamus was issued—four or five months.

"Q. Was it after the decision of the case of *White v. The Auditor?*

"A. I think it was in May, just after Judge Clark's dissent in *White v. Ayer* was filed."

Cross-Examined.

By Mr. OSBORNE:

Q. As I understand you, you say your recollection is that the oath administered to Judge Montgomery was the one ordinarily administered to witnesses in Court? A. Yes, sir. That is my recollection of it.

Q. Did you administer the oath? A. Yes, sir; as Chairman of the Committee.

Q. Did you have any printed form? A. No, sir.

Q. Of course there were nobody there but these gentlemen? A. Each witness was examined separately.

Q. I said, as a matter of course, it was simply an inves-

tigating committee on the part of the House—no one was present at the time? A. No one at all, sir.

Q. I do not see any record of the oath here? A. No, sir; I think I noticed that myself.

Q. You recall that Judge Montgomery stated that the oath as he recollected it, was to answer such questions as might be asked? A. Yes, sir.

Q. Is that the usual oath under these circumstances? A. I hardly think so, Mr. Osborne. My understanding is, that you took the procedure in the courts, usually these questions about true answers make, are asked the witness when the Court is determining some preliminary question.

Q. Was that what you were doing? A. No, sir.

Q. It did turn out to be. A. Now, understand me, Mr. Osborne. In speaking of this oath of Judge Montgomery, I am speaking simply as anyone else would of his recollection of what he was sworn to.

Q. I would not do you injustice for a moment, or put any interpretation on your testimony except that you are speaking from your memory. Of course you do not like to be absolutely positive about it. A. Yes, sir. It is just a matter of recollection.

Q. I see here, and you will see yourself (counsel hands paper to witness) that you did not at the end of the testimony go on and tell him to state any material facts that he may know, as to the subject of inquiry. A. Yes, sir. There were simply questions asked.

Q. Simply questions asked and answered? A. Yes, sir. I think possibly I ought not to say that either, because my impression is not distinct. I have an impression about something else that occurred, but it is not distinct, and possibly I ought not to state it.

Q. Did not you ask the questions? A. I asked nearly all the questions that were asked of nearly all the witnesses. There were some questions, however, asked by the other

members of the Committee. I have not examined closely with reference to that.

Q. See if there are any questions asked by anybody else? A. I doubt if that would appear. I know there were questions asked by others, but as I began the examination, the questions would be frequently put down as coming from me, when the other members of the Committee would ask the question.

Q. You had no rule like we have here, that one examiner should examine alone? A. No, sir.

Q. Each one of you gentlemen asked whatever question you saw fit? A. Any member of the Committee was at liberty to ask any question.

Q. I understood you to say that neither one of the respondents, or any one representing them, were present? A. No one at all, sir. I did not think it would be proper for them to be there.

Q. I did not mean to reflect on the propriety. A. That is a fact, that neither one of the respondents was there, and there was no one representing them.

Q. That evidence of Judge Montgomery was taken down wrong by the stenographer? A. Well, there was this. It is the experience that we have all had in stenography, you will find a word here and there that is wrong, in the typewriting. I think you will find that there were not a great many corrections in the evidence.

Q. As a matter of fact, you did not aid him in the correction? A. I do not think so, Mr. Osborne. I am quite sure that Judge Montgomery came to me, or at least we spoke together about it. I rather think I told him that before the evidence was printed, I would give him an opportunity to look over it, so that no injustice might be done him, and I am quite sure that Judge Connor went over his evidence with him.

Q. You occupy the position both of Manager and witness? A. Yes, sir.

Q. Will you indicate there what particular answers there are that you intend to impeach Judge Montgomery on? A. I have not examined the evidence of Judge Montgomery since he went upon the stand for the purpose of seeing if there was any contradiction in this printed evidence with that he gave on yesterday. So far as I know, there is none.

Mr. WATSON: "We have no particular portion. Only it was so much fuller yesterday."

Mr. COOK: "We will admit that. Stand aside."

J. F. SPAINHOUR, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination.

By Mr. WATSON:

Q. Were you present when the oath was administered to Judge Montgomery? A. I was.

Q. What was the oath? A. I could not state positively the language of the oath. My best impression is that it was the usual oath—the same kind that is administered here.

Q. To do what? A. To tell the truth and the whole truth with reference to the matter investigated, I think. I am sure that the same oath substantially was administered the other witnesses that came before us.

Cross-Examined.

By Mr. OSBORNE:

Q. You say you think you are sure? A. I could not state positively that the same language was used, but I think substantially the same oath was used.

Q. Are you certain it was the oath Judge Montgomery took? A. My best impression is that Judge Montgomery took exactly or substantially the same oath that all the witnesses took.

Q. Why? A. I do not know.

Q. Why was not the oath put down here? A. I do not know, sir. I was not the stenographer.

A. W. GRAHAM, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination.

By Mr. WATSON:

Q. Did you hear the oath administered to Judge Montgomery at the hearing before the Committee? A. I did.

Q. What was the oath? A. It was the same, to tell the truth, the whole truth and nothing but the truth in regard to the matter now under investigation by the Committee.

Cross-Examined.

By Mr. COOK:

Q. You are positive, to your recollection, that oath was administered to Judge Montgomery, as you quoted it? A. I am.

Stand aside.

LOCKE CRAIGE, *a witness called in behalf of the Managers, being duly sworn, testifies as follows:*

Examination.

By Mr. WATSON:

Q. Did you hear the oath administered? A. Yes, sir.

Q. What was it? A. It was the usual oath, that is my distinct recollection about the matter.

Q. What is the usual oath? A. To tell the truth, the whole truth and nothing but the truth about the matter under investigation.

Cross-Examined.

By Mr. Cook:

Q. You are one of the Managers? A. Yes, sir.

Q. One of the sub-committee? A. Yes, sir; I was.

Q. This investigation was conducted by specific interrogatories and answers? A. Yes, sir.

Q. There is nothing in the record to show that Judge Montgomery, after he had answered these specific interrogatories, was given the usual question, that if he knew anything else material to this inquiry he would please state it. A. I do not know. I have not read the record with a view to ascertaining that fact.

Q. Please do so.

(The witness examines the printed record of the investigation before the Committee.)

A. I would have to read all of the answers, to answer that question.

Q. You and I know, as lawyers, that that is the last question? A. I find no such question here at the latter part of the examination.

Q. Now, if you have any doubt as to whether it is in the body of the examination, I will give you time to look over it. A. I see no such question as that.

Q. Now, Mr. Craig, I want to ask you this question: Of course this is a matter of recollection—might not this have been the oath: "Do you swear upon the Holy Evangelist of Almighty God that you will true answers make to such questions as may be asked you by this Committee touching this investigation?" A. I do not think that was the oath. That is not my recollection about the matter.

Q. Was there nothing to direct your attention to the form at the time it was administered to Judge Montgomery? A. No, sir.

Q. How many witnesses had been examined when he was examined? A. He was the second or third witness.

Q. If the form of the oath had been that to which I called your attention in the next to the last interrogatory, do you think you would have noticed it? A. Why, I do not know that I would.

Q. Was there no one there to ask any questions for these respondents? A. There was no one there except four members of the sub-committee, the witness and the stenographer.

Q. I suppose you intend for us to imply from that, that they had no friends there? A. There was no one there except the four members of the sub-committee when Judge Montgomery was examined, according to my recollection—four members of the sub-committee, the stenographer, Judge Montgomery and myself.

Q. We understand, then, that they were not present either in person or by counsel? A. No, sir; they were not.

Re-Direct.

By Mr. WATSON:

Q. Were you instructed, when making this investigation, to notify the Judges?

Mr. COOK: "It does not make any difference what he was instructed to do."

Mr. WATSON: "He said, did they have any friends there. You understood they ought to have been there."

Mr. COOK: "No, I did not. You seek to impeach Judge Montgomery—the lawyers here know—it does not reflect upon the laymen here that they do not know. You know, as well as I do, that the facts are not as fully drawn out unless an opportunity for a cross-examination is allowed."

Mr. WATSON: "I want it to be understood. You understand. I think the laymen can take care of themselves. You understand that the Judges ought not to have been present by representatives."

Mr. COOK: "No, I do not. I just want to show the fact that they were not, and you are trying to impeach them."

Stand aside.

Mr. POU: "Mr. President, the next piece of evidence we introduce is the record of the organization of the North Carolina Shell-Fish Board."

Mr. OSBORNE: "We do not object to the organization."

Mr. COOK: "We would like to be heard."

Mr. POU: "This is a part of the records of the late Mr. C. C. Allen, Secretary of the Board of Shell-Fish Commissioners, which was identified as being in his handwriting, and signed by him, as Secretary of the Board, yesterday."

The PRESIDENT: "What do you offer it for?"

Mr. POU: "We offer it to show that Mr. C. C. Allen was elected, and was the only person elected, Secretary of that Board; that these vouchers under the Act of '99, should have been signed by him."

Mr. COOK: "Now, Mr. President and Senators, there is not a particle of evidence that that is the record. The only evidence that they introduced here for the purpose of establishing that as a record, is the testimony of a gentleman who had no sort of connection with this Board, none in the world, but found these papers in a desk which was kept by one Mr. Allen, and this Allen was his father-in-law, and this Mr. Allen is now dead, and this Mr. Allen, purported to be dead, purported to be Secretary. He does not prove that he is the Secretary, and was acting as Secretary."

The PRESIDENT: "It is already in proof that he was Secretary."

Mr. COOK: "I submit to you that we objected to it, and he said he would not insist on it. He had stated that he simply wanted to file these papers, and he said it might be withdrawn, that he was acting Secretary, and substituted 'purported to act.' Now, to say that these scraps of paper which they offer here are the records in that case, we say are

not established. I take it for granted these gentlemen have organized, and they have a record. These gentlemen acting as Commissioners are not all dead, but if the Secretary is dead, they can come here and establish the fact that he was Secretary, by proper testimony. All I have to say, Mr. President and Senators, is that it is not a proper record in this case. It is not established as such."

Mr. C. M. BUSBEE: "The evidence is this, that C. C. Allen was acting Secretary of the Board of Shell-Fish Commissioners. It was established by the witness, Whitehurst, that C. C. Allen was acting Secretary of the Board of Shell-Fish Commissioners, and that records and papers, documents in the possession of the witness, Whitehurst, were found by him in the desk of Mr. Allen, in the pigeon hole, where the witness knew he kept the papers of the Shell-Fish Commission."

The PRESIDENT: "Suppose that was true, how would it affect the respondents?"

Mr. C. M. BUSBEE: "It affects the respondents in this way, because it is in evidence which we obtained from the Auditor, and from the documents in the possession of the Auditor, that the accounts presented to the Auditor, and audited by him, were not signed by the Secretary of the Shell-Fish Commission, as the law required."

The PRESIDENT: "I think that the only records that do affect the respondents, are those that come up from Perquimans County."

Mr. C. M. BUSBEE: "It is well connected with the evidence that was admitted. That was admitted upon the part of the Auditor, found among the official records and vouchers of the preceding Auditor, Mr. Ayer. This document showed this, that the vouchers submitted to the Auditor by Mr. White were countersigned by a person purporting to be Secretary. The opinion of the Supreme Court, and the judgment of the Supreme Court, require that these vouchers should be signed

by the Secretary of the Shell-Fish Commission, and we propose to show that the party purporting to sign these reports as Secretary of the Shell-Fish Commission, was never Secretary of that Board. We have had all that argument before, and that the respondents were responsible for the illogical effect of the writ of mandamus, that they issue to the Auditor. And this evidence, Mr. President, is precisely in line with that evidence."

The PRESIDENT: "I do not think it is admissible."

Mr. WATSON: "So far as I can see, I think we had a certain paper, but we can not anyone of us remember what it is. And as far as I know, I think that is the case for the complainant."

Mr. POU: "Mr. President, I suppose there will be no objection to the Clerk's returning these papers to Mr. Whitehurst?"

The PRESIDENT: "No, sir."

Mr. FOUSHEE: "I move to take a recess for fifteen minutes."

The motion is adopted.

At 11:50 the Court reconvenes and Mr. William A. Guthrie begins argument in behalf of the Managers.*

At 1 o'clock the Court takes a recess until 3 o'clock p. m.

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*NOTE.—The original resolution of the General Assembly providing for the printing of the proceedings of the Court of Impeachment provided that "only the opening and closing arguments of the attorneys" should appear in the printed record. Therefore, no official record of the intermediate speeches was made. At the adjourned session of the General Assembly a resolution was passed providing that all the speeches should be included in the printed record. The Clerk of the Court was, of course, dependent upon the speakers themselves for copy of their speeches. This was not furnished in divisions fitting into the convenings and adjournments of the court, and hence the intermediate speeches are given separately in subsequent pages. CLERK.

AFTERNOON SESSION.

At 3 o'clock the Court reconvenes.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Burroughs, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard —48.

Mr. GUTHRIE resumes and continues his remarks in behalf of the Managers until 6 o'clock, when the Court adjourns until 10 o'clock to-morrow morning.

TWELFTH DAY.

SENATE CHAMBER,

Friday, March 22, 1901.

The Court of Impeachment meets pursuant to adjournment at 10 o'clock a. m., being called to order by the President, and the Sergeant-at-Arms makes due proclamation.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb and Wood—47.

Mr. W. A. GUTHRIE, of counsel for the Managers, concludes his remarks to the Court at 10:30 o'clock, and

*Mr. C. M. COOK, of counsel for the respondents, addresses the Court until 1:30 o'clock, when the Court takes a recess until 3 o'clock.

AFTERNOON SESSION.

At 3 o'clock the Court of Impeachment reconvenes.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Broughton, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh,

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* See explanation, page 550.

McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood, Woodard—46.

*Mr. C. M. BUSBEE, of counsel for the Managers, addresses the Court of Impeachment until within a few minutes of the hour of adjournment, when

Senator HENDERSON moves that the Court adjourn.

Senator FOUSHEE moves, as a substitute for the motion of Senator Henderson, that the Court take a recess until 8 o'clock p. m.

The substitute is lost, the motion of Mr. Henderson is adopted, and the Court is adjourned until 10 o'clock to-morrow.

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* See explanation, page 550.

THIRTEENTH DAY.

SENATE CHAMBER,

Saturday, March 23, 1901.

At 10 o'clock the Court of Impeachment meets pursuant to adjournment, being called to order by the President.

The roll of Senators is called and the following are present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—48.

Mr. F. H. BUSBEE, of counsel for the respondents, suggests that some order be made for the speeches which are to follow. Being informed that the Managers do not propose to follow Mr. Patterson, he suggests that they might take the same position and decline to double their speeches this early in the argument.

Mr. MANAGER GRAHAM suggests that it will be necessary for counsel for the respondents to follow each other at some time during the progress of the debate.

The PRESIDENT announces that argument will continue as begun, as far as possible, and that counsel for the Managers will follow Mr. Patterson.

*Mr. J. LINDSEY PATTERSON addresses the Court in behalf of the respondents until 12:30 o'clock.

Mr. MANAGER ALLEN calls the attention of the Court to a statement in the *Morning Post* that the testimony of

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* See explanation, page 550.

Messrs. Managers Graham, Craig, Spainhour and himself had been intended to impeach the character of Justice Montgomery. Mr. Allen states that it was only for the purpose of impeaching his recollection as to the incident of the oath administered to him before the House sub-committee.

The Court takes a recess until 3 o'clock.

AFTERNOON SESSION.

The Court reconvenes at 3 o'clock, and is called to order by the President.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntyre, McIntosh, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood, Woodard—50.

*Mr. THEODORE F. DAVIDSON, of counsel for the Managers, addresses the Court until 5 o'clock, and is followed by Mr. F. H. Busbee, in behalf of the respondents, until 6 o'clock, when the Court adjourns until 10 o'clock Monday morning.

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* See explanation, page 550

FOURTEENTH DAY.

SENATE CHAMBER,
Monday, March 25, 1901.

The Court of Impeachment meets pursuant to adjournment at 10 o'clock a. m., and is called to order by the President.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Vann, Ward, Warren, Webb, Wood, Woodard—47.

Mr. JUSTICE offers the following resolution:

"*Resolved,* That when this Court adjourns to-day at 6 o'clock p. m., it adjourn to meet at 8 p. m., and hold until 10 p. m."

The resolution fails of adoption by a vote of 23 ayes, to 24 noes, as follows:

Those voting in the affirmative are: Senators Alexander, Aycock, Bray, Broughton, Brown, Foushee, Foy, Gudger, Henderson, James, Justice, Leak, Lindsay, Long, McAllister, McIntyre, McNeill, Scott, Speight, Sugg, Travis, Webb, Wood—23

Those voting in the negative are: Senators Arrington, Buchanan, Burroughs,Calvert, Candler, Crisp, Currie, Dula, Glenn, Marshall, McIntosh, Miller of Caldwell, Miller of Pamlico, Morton, Pinnix, Robeson, Smith, Stikeleather,

Stringfield, Thomas, Vann, Ward, Warren and Woodard —24.

*Mr. F. H. BUSBEE concludes his argument in behalf of the respondents, and is followed by

*Mr. B. F. LONG, also in behalf of the respondents, who continues his address until 1 o'clock, when the Court takes recess until 3 o'clock.

AFTERNOON SESSION.

The Court reconvenes at 3 o'clock, and is called to order by the President.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—48.

Mr. LONG resumes his argument in behalf of the respondents, and concludes at 5:50, when the Court adjourns until 10 o'clock to-morrow.

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* See explanation, page 550.

FIFTEENTH DAY.

SENATE CHAMBER,
Tuesday, March 26, 1901.

The Court of Impeachment meets pursuant to adjournment at 10 o'clock a. m., and is called to order by the President.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

*Mr. JAMES H. POU addresses the Court in behalf of the Managers until 12:50 o'clock, when the Court takes a recess until 3 o'clock.

AFTERNOON SESSION.

The Court reconvenes at 3 o'clock, and is called to order by the President.

The roll of Senators is called and the following answer present:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister,

* See explanation, page 550.

McIntosh, McIntyre, McNeill, Michael, Miller of Pamlico, Miller of Caldwell, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

*Mr. THOMAS J. JARVIS addresses the Court in behalf of the respondents until 4:30 o'clock, when

Mr. F. I. OSBORNE begins the closing argument in behalf of the respondents.

Mr. OSBORNE speaks as follows:

Mr. President:—When the rule of the white people of North Carolina was firmly established, on the basis of the constitutional amendment enacted in the organic law upon the 7th of August, and a splendid victory had crowned the efforts of the political organization whose mission it was to establish that rule by the enactment of the amendment, the vast majority of the Democratic party confidently expected that all political hatred would be forgotten in the joy and gladness of our success; that the time had come for all to shake hands, and thank God that the curse of negro rule had passed away forever. "Let us have peace," was the cry of every earnest, patriotic heart. We had a right to expect that peace would be granted by the ruling party, for on every stump in the State it had been promised by every speaker, and chiefest among all, by our chosen leader, the high-toned, eloquent and gifted Aycock. In the words of his inaugural address, "Peace will complete the circle of our felicity," uttered in the presence of a vast audience, the heart of every man beat in unison with the utterance, and even our most inveterate adversaries welcomed it as the glad tidings of great joy. They knew that there was one among us who would redeem to the very letter his promises, as far as in him lay. They trusted him even further than this, knowing his ability, his influence with his party leaders, his love for

* See explanation, page 550.

them and their intense love for him. They thought that these words but voiced the sentiment of his party, and were an earnest of that which was to come. But that trust proved a dream from which there was a rude awakening. Hardly had those words been spoken when the House of Representatives passed a measure so cruel in its contemplated results as to shock the merciful, and so revolutionary in its tendency as to destroy the respect of our people for our judiciary, as to cause the conservative to shudder.

But in this, history but repeats itself. All great revolutions rush to extremes, and we are but following the example of the Republican party. "Let us have peace," said Grant at Appomattox, and the Southern soldier returned to his home after a strife and turmoil of four years, with perfect confidence in the words of the "Silent Commander," who spoke little, and meant every word that he said. But the Republican party, flushed with victory, and with the triumphant overthrow of secession, rushed on madly and wildly to crush and degrade the Southern people. They were stayed for some time by the veto of the President. His was the single friendly voice raised for the South. Having a vast majority in both Houses, and more than two-thirds in the Senate, they attempted to remove the only constitutional barrier to their license, by the impeachment and removal of the President. Counting that a sufficient number of Senators in their party zeal would perhaps be influenced by that silent and unconscious spirit to be unmindful of the law, they reckoned confidently upon victory. The result is known. There were found enough righteous men in that body to redeem Sodom. Mr. President and Senators, that the parallel may be completed between these cases by the result, is the honest prayer and hope, I believe, of the great majority of the white voters of North Carolina. I have alluded to the case of the impeachment of the President, on account of the likeness between the two cases, but more especially be-

cause it has been so repeatedly suggested by the Managers themselves. That one was political is admitted now by all, even by Mr. Blaine in his "History of the Congress of the United States." Says that writer, "If General Grant or Mr. Lincoln had dismissed Secretary Stanton from office, does any one believe that either would have been impeached?" The answer is easy, says the writer. I say here to-day that this impeachment to my mind is political, if we are to judge by the speeches of the promoters of this scheme in the House of Representatives. Some of them, most of them indeed, argued this case upon its legal merits, maintaining the proposition that is absolutely unmaintainable, that if the Judges made a mistake in issuing the mandamus, even though the mistake was honest, they were guilty of an impeachable offence. But the learned and eloquent member from Buncombe, in words of surpassing force and beauty, set on fire by party passion, disclosed the full motive for this prosecution when he informed the audience that the Supreme Court of North Carolina was packed against the Constitutional Amendment, and that they should be impeached because of their preconceived opinions. As a matter of course, the speech was not based upon the slightest evidence. No one testified as to the opinion of either one of these Judges upon that great question, and the accusation comes simply from a telegram sent from Washington by certain politicians prominent in the Republican party. No one of these politicians spoke for these Judges, and neither of them know anything about their opinions on the subject—and there is one thing certain, they did not speak in their behalf.

But to return to the argument of my friend from Buncombe. I attended not long since a Baptist Church, and heard a splendid sermon. I was very much struck by a figure used by the minister. He said that on one occasion a stranger entered a vast hall and took his seat, immediately

he began to hear the sweetest music that ear had ever listened to. Volumes of sound rolled over the vast assembly from the deep-toned notes of the organ, soft flute, and shrill clarionette. He looked up, and behold the great Paganini playing on a violin with one string! When I read the speech of the eloquent member from Buncombe, I said to myself, Lo, that is Locke Craig, and not one fact.

But even if the accusations which I deny here to-day were true, Senators, there is not the slightest excuse for this prosecution. There has not been a moment during the sitting of this Legislature when a constitutional law could not have been enacted which would have prevented these Judges from ever hearing of our Constitutional Amendment. And more than that, there was legal ability sufficient in the House to know it. Before that measure can be tested some one must be deprived of a right which he claims under the law, as it now stands, the right to register a vote. The next election takes place in 1902. Every wrong must have a remedy under the law, and a perfectly constitutional remedy could have been given any complainant by requiring him to give thirty days' notice to the contesting party, and further requiring that the case should be put upon the regular docket of the Superior Court, to be tried at the next term thereof. We resorted to this very procedure in our last election with reference to mandamus as to the election of officers, and no one doubted the constitutionality, and no one brought the case before the Court of North Carolina because there was no uncertainty in the matter. The case so constituted would never have come before these Judges for decision, provided the party to which I belong is successful at the next election, as it will be, unless it is wrecked by violent measures, such as this. I need not argue before an assemblage of intelligent North Carolinians that an impeachment for political purposes is wrong in the sight of God and man. It is worse than a bill of attainder, for though that punishes for deeds that

are not offences at the time that they are committed, yet it is applied to acts already done, and not to those which may be done in the future. A bill of attainder is thus far justified, that it is inflicted on those whose conduct is an outrage to our ideas of natural justice and decency. My friend from Buncombe calls this a heroic measure. Of course I apprehend that he used the word in its figurative sense, and not in its primary meaning. He takes the figure of speech from an operation under a surgeon's knife. The physician is cruel to his patient indeed, he cuts off his limb that his whole body may be saved. He tortures him in behalf of human life.

But, sirs, there is no justification for such a measure in a court of justice, where human rights have to be considered under solemn oaths. We can not do evil here that some remote good may perchance come to the Commonwealth by our action. That maxim advocated by a certain order in the Catholic Church has been abandoned even by the order that originally taught it. That we may do evil that good may come has long been banished from the councils of honorable men. The argument, however, is an old one, and has often been used before an audience with effect. It is not the first time, by any means, that it was ever announced by a great orator.

One conspicuous example, though, I can cite, and I commend it to the consideration of the honorable member from Buncombe, and his assistant Managers. It was used just two thousand years ago on a memorable occasion. Let me cite you to the remarkable argument. "And one of them named Caiaphas, being the High Priest that same year, said unto them, Ye know nothing at all, nor consider that it is expedient for us that one man should die for the people, and that the whole nation perish not." The result of the argument in that case was the crime of all ages. Senators, I warn you against the seductive reasoning, lest it should result in the commission of the same unrighteous deed.

But to use the word heroic in its proper sense, I can see no heroism in this action. There is nothing heroic to my mind in a great party, with a triumphant majority in both Houses, seeking to degrade two high-toned and honorable gentlemen, and one of them old and feeble, enjoying the confidence of their fellow-citizens, because they differ from us in political faith; and by means of appeals to party loyalty attempt to humiliate and disgrace them. If I were intending to call things by rough and real names, I would term this measure something else than heroic. The member from Buncombe appreciates the full significance of the word as I use it, when he tells us how he stood with a handful of Democrats in the presence of political enemies three times their number, at the risk of his life, proclaiming Democratic principles. Out speaks the noble heart of the gentleman in language worthy of himself. I join hands with him there, and say that was heroic. He who battles for his country "against fearful odds, for the ashes of his fathers and the altars of his gods," is a hero. He who, true to his political convictions, in Legislative halls or at the polls expresses them in spite of overwhelming majorities against him, is a moral hero. He who, in the presence of great temptation resists the wrong, and does the right, is a still greater hero. The Judge on the bench, when threatened with impeachment in the presence of a hostile party, thirsting for his honor, who still renders his righteous judgment, is another hero. Such a hero, my friends, I am defending here to-day in the person of the venerable Chief Justice. As in the case of all virtue, at the bottom of heroism is self-sacrifice, and there is no self-sacrifice in the infliction of unjust and severe pain under any circumstances upon a single human being, however humble he may be. But with reference to the motives of those who originated this scheme of impeachment in the House of Representatives, I have naught to do. Perfectly conscious of the rectitude of my own intentions, and of the rectitude of the

gentlemen whom I here defend, I shall ascribe nothing else but good intentions, to them, because I believe that at the outset of this prosecution they thought that they were justified in passing a measure of impeachment. Pardon me, Senators, with those motives I think you have less to do than I. The House is simply a grand jury in this cause, with more liberty and discretion than an ordinary grand jury in an ordinary criminal case, in that if the members of that body had thought it unwise or inexpedient to make a presentment at this bar, under their oaths, they were not compelled so to do; whereas, a grand jury ordinarily has no discretion, and must act upon evidence alone. But like other grand jurors, they heard the evidence, but upon one side, and had the right to present if they found probable cause for conviction. You Senators have greatly the advantage of them. You not only heard the testimony that was presented to the House of Representatives, but you hear the additional testimony of the defendants.

As for myself, I have no apologies to make to any one for the position that I occupy here; having deliberately, after a full examination of the testimony and the law in this case, determined for myself that there is no cause of guilt against these respondents, I do the duty of the hour and fling defiance to the future. I wish you to understand that I have opposed this impeachment in every way that is justified by honor. I have talked to every member of the House of Representatives who desired to speak to me about it, and unhesitatingly expressed my opinion against it in season and out of season. And I shall continue to utter the same sentiment unto the end of my life. Senators, I stand for the law which has been in nowise broken by these respondents, either intentionally or unintentionally. I will show you that every decision of these respondents is in perfect consonance with the Constitution as it has been expounded by those legal giants who have made the name of North Carolina famous

in the annals of jurisprudence; that in these decisions they have consistently followed precedents hoary with age and with wisdom, and repeatedly endorsed by their predecessors and associates in office. In construing the statutes, they have ever regarded a well-known rule, and endeavored to give them an interpretation consistent with the Constitution, and only declared them void when compelled by necessity either to uphold the Constitution, or to destroy it by proclaiming that the will of the Legislature is higher than the will of the people expressed in the organic law, which is the supreme law of the land.

Senators, I stand for justice under that law, as I comprehend it. I stand for justice, as you, Senators, who have studied law, understand and practice it. No man, however humble he may be, can be convicted without evidence of a guilty intent, and that intent must be established beyond reasonable doubt, as well as any other fact in the case necessary for conviction. I shall show you that there is no evidence in this case to satisfy you that these Judges have decided a case except upon the highest and purest motives. Senators, I stand for the people of North Carolina as much as these Managers. They are not entitled to a monopoly of citizenship of the State. They are simply officers performing their duty, and so am I a sworn officer of the Court, holding my authority from the same source, from the people, and by virtue of the law. And when I stand here defending two of your fellow-citizens in their right to hold the high office to which they have been elevated by the voice of the people, I am defending the most majestic title in the Republic, that which comes from the source of all titles derived from the majority of the votes of a free people. Behind them stand a majority of the qualified voters of this State. I defend their endorsements here to-day, and state before you, and shall show to you that the authority that has been given to these two respondents to hold their high position should not now

be withdrawn from them until the people speak at the polls again upon their qualifications. That which the people of North Carolina have given unto them, let no Court on earth, without just cause, take away from them.

I appear also for the Democracy of North Carolina. When I use the word, I do not mean a mere theory of government to be discussed by political philosophers in a closet, but the Democracy that works night and day to carry its principles to victory at the polls. Of such an organization, I have been an active member. I count myself one of the material parts of the machine. From the time I cast my first ballot for the Great Tribune of the people, to the present hour I have clung to my party with earnest, passionate devotion, never deploying or skirmishing between the lines, but fighting at all times within them, and with no variableness or shadow of turning. For the organization of Democracy to me is the political impersonation of the integrity and honor of the people of the State. It is because I love my party that I am here to-day, to prevent a Senate composed for the most part of my political brethren, and greatly of my personal friends, from rendering a verdict against which, without any offence to those who differ from me, my sense of justice and humanity revolts.

But, Senators, I must hurry forward to the argument. Impressed with the solemnity of these proceedings, and in a position absolutely novel to me, I am afraid I can not rise to the heights of the great argument. Indeed, the mind is weak, but the spirit is willing. Unseen and friendly hands seem to support me, voices inaudible to all of us I hear, or seem to hear, that whisper to me words of consolation and hope and confidence. They say, or seem to say, to me, "Feeble champion of the right, hold not back; remember the race is not always to the swift, nor the battle to the strong. Remember in a just cause, the single pebble from the brook was enough in the sling of the young shepherd." In all the his-

tory of our people never before has there been enacted a scene like this. There have been party strifes, indeed, and serious ones. Many a time the Legislative Department has been thwarted by the Judicial in our State. It was so in 1870 and 1871, when a Legislature, hostile to the Executive Department, attempted to take charge of the offices in the State, but it was checked by the Supreme Court, by its construction of section 10, Art. III, of the Constitution of 1868, which gives the appointment of all officers to the Governor of the State. Wise counsel then prevailed. There was Jarvis, there was Vance at the head of the Democratic party, and no one thought of impeachment. The Legislative will again was checked in 1895, and in 1897 by the same tribunal, then composed of these respondents, whom you are now trying. But they happened to agree in political faith with the Legislature, and there was no impeachment. It remained for us who happen to have been thwarted in our efforts to take charge of certain offices to inaugurate this unknown and harsh proceeding.

What is the rule of law which governs now in this cause? I take it to be exceedingly simple, and well understood by everyone without discussion. You must be satisfied beyond a reasonable doubt first, that the Court erred in its decision, and next that the error was wilful and intentional. If the prosecution should fail on either one of these propositions, then your verdict must be "Not guilty," on each and every one of these articles. To contradict these plain principles of law, my friends, the Managers resort with confidence to the old adage, that ignorance of the law excuses no man, and maintain that it is applicable to this case, and ought to be applied to the Judge on the bench as well as to the individual citizen. Now, sirs, I maintain the proposition that the adage is never applicable as the Managers understand it to any officer who has a right and is obliged to exercise judgment or discretion in deciding a proposition of law, but that ignor-

ance of the law excuses no man when the maxim is clearly understood and properly applied has a universal force and effect, and bears alike upon every individual, be he officer or private citizen. The Managers seem to think that applied to judicial officers, it means the law governing the case which he is called upon to determine, and, therefore, if he make a mistake, or error in his judgment, however faithfully he may endeavor to do his duty, he is nevertheless impeachable if he should err, and ought to be convicted and removed from office. The Managers have simply made a mistake in the construction of this adage of the law. This adage means simply that no man can plead ignorance of the law which governs his conduct in the capacity in which he is placed. To make this argument clearer still by illustration, it is against the law governing the duty of Judge that he should accept a bribe to make a decision in any matter. He is entitled only to the salary as fixed by the statute laws of North Carolina. If he accept more from either side, or from anyone, why then indeed he is impeachable and he can not plead, as was plead by a great chancellor years ago, that he was ignorant of that law which forbids him to take bribes. The case to which I refer is the case of the great Bacon. In his impeachment, the defense that he set up was not that he did not accept presents from suitors, but that he had done so in accordance with the customs of other chancellors. The House of Lords could hear none of this, because an iniquitous custom could not establish the law. The custom was not the law, and if the Chancellor was ignorant of the law he was still guilty under it. But again, there is a law on our statute books that a Judge shall not be drunk while performing his official duties, nor shall he be drunk in a public place, nor shall he commit an offence calculated to bring into contempt the high office which he holds. If these Judges were tried to-day for violation of that statute, then we could not plead ignorance of that law, because that is the law governing the conduct of a Judge. If he were guilty of other misconduct—in the

language of The Code, "If he wilfully decided that to be the law which, in his opinion, was not the law, then whether he decided right or wrong he would be guilty, and could not be heard to plead that he did not know that such conduct on the bench was misconduct, and forbidden by the law."

If I am right in this proposition, the second inquiry is simply what is the duty of the Judge with reference to his decision; for after all that has been said, these respondents can only be convicted of a violation of duty. In order to determine the duty of a Judge, we can only refer to the oath of office which he takes. Of course the Judge is held to the same accountability as a private citizen, when he acts as a private citizen. If he assaults another, he can not plead ignorance of the law of assault and battery; if he should desire to indulge in the sale of whiskey, he can not plead ignorance of the law governing the sale of intoxicating liquors; if he should commit homicide, he can not plead ignorance of the law of murder; if he should intrude on his neighbor's property, he can not plead ignorance of the law of trespass. Far from being held to a lower rule of responsibility than a private citizen, he is held to a rule of responsibility which the private citizen never feels. He must not only do his duty as a private citizen, but he must do his duty as a Judge, and he can not plead ignorance of the law governing his conduct in either capacity.

But recurring to the oath of office. What is that oath? And what is its meaning as interpreted by reasonable human beings, except managers perhaps, of a prosecution and their associate counsel. You will find it in The Code. Let me read it to you:

I, A. B., do solemnly swear (or affirm) that, in my office of Justice of the Supreme Court of North Carolina, I will administer justice without respect to persons, and do equal right to the poor and the rich, to the State and to individuals; and that I will honestly, faithfully and impartially perform all the duties of the said office, according to the best of my abilities, and agreeably to the Constitution and laws of the State: so help me, God.

Now he does swear allegiance to the Constitution of the United States, as a matter of course; so does the citizen. He swears allegiance to the State of North Carolina, and obedience to her laws. But when you prescribe his duties as a Judge, he says: "I will perform those duties to the best of my ability." Senators, let me sum up in a few words these necessary conclusions with reference to the maxim that ignorance of the law excuses no man. It is applicable to all alike. I mean the law governing our duties under the particular circumstances under which we may be placed. The Judge occupies a dual capacity. He is an officer, and he is a citizen. As an officer he must know the law governing his conduct as such and can not plead ignorance thereof. As a private citizen, he is like any other citizen, and he must know the law governing the conduct of a citizen, and can not plead ignorance thereof. Therefore, he is held to a higher degree of duty than the citizen, in his individual capacity, ever knows or feels. These respondents stand here charged with misconduct in office. What is the interpretation of the word "misconduct?" In the subsection of The Code, I respectfully submit to you that inasmuch as the word "misconduct" in office follows the word "corruption," the subsection reading, "Every officer in this State shall be liable to impeachment for corruption or for other misconduct in office." According to all rules for the constructions of criminal statutes, the maxim that a thing is known by its associates, *noscitur a sociis*, is as well recognized by the Courts as the proverb, "Birds of a feather flock together;" and that, "A man is known by the company he keeps." The use of the word "corruption" at the beginning of this subsection qualifies what kind of misconduct the statute is forbidding. It means, then, misconduct like unto or similar to corruption. Corruption, in legal parlance, generally means corruption for a thing of value; and misconduct in his official capacity means misconduct of the same nature as corruption for a thing of

value. For instance, if a Judge decides a cause for any other motive than an honest purpose to decide the law, that is the kind of misconduct here alluded to. If he decide from fear or favor or malice, or any other sinister motive,then that is the misconduct which is intended to be prohibited in the words following the word "corruption." But the best light that can be thrown upon this subject is to be derived from the oath of office of the Judge, which I have just repeated. The words, of course, governing the whole oath are contained in this simple language, "I will perform all the duties of my office faithfully and impartially, according to the best of my ability." Now, the governing words in the oath are these; that is, they are its very life and soul. The meaning of the oath is clear, and it seems to me every man ought to understand it. The Judge does not pledge himself to infallibility of judgment; he does not swear before his God that he will decide every case as the law is, for if he did, he would insult his Deity by assuming the attributes of the Most High, by placing himself upon an equality with the Knower of all things. If that were a true interpretation of the oath he is required to take before entering office, he would swear to do that which he knew he was incapable of doing, and would stand forsworn before he had ever performed an official act or made a decision. But I do not understand the learned Managers to state that he must swear he is perfectly wise, and will continue in that state of perfection, which no mortal soul has reached, to the end of his term. But they do state that he violates his duty if he makes a mistake, and ought to be convicted of high crimes and misdemeanors; and that means that he does swear to infallibility. In other words, when he says that he will do his duty to the best of his ability, they interpret it to mean that he will do his duty—how, my friends? Better than his ability. And this is *reductio ad absurdum.*

The great difficulty with my friends on the other side, is

that they did not designate the tribunal which is to determine when a Judge has made a mistake in the law; for to try that question satisfactorily the tribunal itself must be infallible. Where in all the world would you find the Judge and the jury to try such a case? My friends, the Judge might be right and the tribunal wrong. But I apprehend from their reasoning here that, in the first place, it is to be settled in the House of Representatives, which determines upon articles of impeachment, and finally by the Senate, that tries these articles; and if these two bodies concur by proper majorities, then the proof of the mistake is perfectly made. This means to accord to you, Senators, which I regret very much to say I can not accord to any living men, perfection of wisdom. I am perfectly willing, if the learned Managers themselves desire to maintain the proposition, that in the House of Representatives they found that infallible tribunal, to concede to them the lofty claim, if they urge it. For, sirs, I would not for one moment argue with any man who would arrogate to himself either perfect wisdom or perfect virtue. He is so much superior to myself that we will have no common plain to stand upon. I might have a silent conviction that he had no just right to the perfection claimed, but still if he urged it, I would not deny it. Senators, you will pardon me if I assume that you are ordinary mortals, subject to the frailties of intellect like myself, who, even on this great question, may perhaps mistrust your own judgment, and are unconsciously looking for some one to guide you to a just judgment, and are willing to accept assistance from us to arrive at a proper conclusion. Ah, my friends, so weak is mortal intellect, as well as moral character, that I have often thought that to the prayer of the Publican, "God, be merciful to me a sinner," all of us might add, and I, perhaps more than any other man, "God, be merciful to me, a fool!"

But I join issue with my friends, and dispute the proposition, no matter from what source it comes, if the House in its

wisdom should think that this Judge has committed an error in his ruling, and you gentlemen should be convinced by the argument that they are correct in that conclusion, I should still maintain that it would be your duty to acquit him, unless you are satisfied that he made a dishonest error. When a Judge takes the oath of office, he swears to decide questions to the best of his ability, and not according to the judgment of any other man. He pledges to decide that to be the law which he thinks to be the law, and not what another person or persons, however his superior in ability or learning they may be, may think to be the law. If I am not right in this simple proposition, then the converse must be true, and it is the duty of the Judge not to decide the law as he honestly deems it to be, but as he thinks that it is not, and as it appears to somebody else. He must render a decision, it is true, because he swears to decide cases, but that decision may be against his own conviction. It would be wise indeed in him to make the attempt to find out what the proper decision in the case would be by the next House of Representatives. For woe be unto him if that decision should involve a political element in it, and the majority of the House should be against him in the decision, and in his political convictions! But pursuing the line of reasoning to its logical conclusion, if he were honest, independent and upright, rendering judgment according to the light of his God-given intellect, he would be impeachable if he made a mistake in the opinion of others; but if he were dishonest, servile and time-serving, he ought not to be impeached, but acquitted and discharged, provided that opinion accorded with the views of the majority of the tribunal trying him.

I have been practicing law now for a quarter of a century, in common with many learned lawyers in my profession. Like unto them, to the best of my ability I have been endeavoring to induce the Judges before whom I practiced, to decide that my client was right in his case, to make him see

the law as I argued it to be, and have generally understood that the Judge did his full duty if he gave me a hearing, and honestly decided the case according to his convictions. But, Senators, how long have we been in error in North Carolina, to what base uses have we put our talents? How mean, how contemptible have we been if we have caused a Judge of the Superior Court to err?

In the opinion of the Legislature, according to the learned argument of the Managers, it would be urged he had committed a high crime and misdemeanor. If I thought this doctrine were true, it would be my duty to retire from the practice of a profession which imposes upon me the necessity of inducing a fellow-being to violate the laws of his country, and to break his oath of office. If the doctrine propounded by the learned Managers is a true one, if Judges can be convicted of mistakes, honest or dishonest, and disgraced and humiliated forever, then every time the Supreme Court grants a rehearing, they are impeachable, and by their own confession. They can not be right in both instances. One decision or the other is not correct. And every time a judgment of the Superior Court is reversed, and a new trial is granted, either the Judges of the Supreme Court or the Judge of the Court below is impeachable. Whenever we ask a Judge for a new trial, or the Court above for a new hearing, we foully insult them. We do them a gross wrong, for we are asking them to confess themselves guilty before God and man.

At the last term of Court, I applied for a rehearing in two cases, and induced the Court to reverse themselves. I had no idea that I was guilty of the ineffable baseness of being *particeps criminis* to the commission of a high crime and misdemeanor. When the learned Manager in this case, who so ably and forceably inculcated the doctrine I have just been discussing, applied for a mandamus in *Garner v. Worth*, and obtained an order from Judge Robinson, mark it, a per-

emptory mandamus, on the Treasurer of North Carolina to pay funds out of the treasury in the oyster claim, on the ground that there was an appropriation, and the Supreme Court reversed Judge Robinson, deciding that there was no appropriation, then Judge Robinson was guilty of a high crime and misdemeanor in granting the mandamus, on the argument of the learned counsel; or the Supreme Court which reversed him was impeachable. Both could not be right, one or the other made a mistake. If I can be allowed to pass upon the question in my own mind, I must say that it seems to me that the Judge below erred.

Now, my friends, the learned Manager seems to think that when the brief in that case was read in the House, some gross wrong was done him. He said that he understood that Judges Furches and Douglas had tried to get some Democrat to produce his brief in the House. In that, I wish to state before you, he was absolutely mistaken. Neither one of these Judges inspired any one to read his brief, or thought about it. I only refer to his argument in the case, not for the purpose of embarrassing him in any way, but because it sustains me in the contention that no Judge can be impeached for a mistake made.

Judge Allen was on the bench, as we all know, and bid fair from his great legal ability to be an ornament thereto. I, for one, was delighted to see so able a man elevated to a position of which he was so worthy. Judge Allen himself knows, as he sits here to-day, that he himself erred. But Judge Allen could not and would not find that there was any impeachable offence in his own error.

I see another Judge among the Managers over there. He bears a historic and noble name in North Carolina, the name of Graham. He too, like my friend Judge Allen, was appointed to the bench by Governor Carr. Will he stand up here before you to-day and say, "I was infallible. I never erred, and if I did err, this House of Representatives, of

which I am a member, should impeach me, and this Senate that now tries these Judges should convict and disgrace me." But Judges Allen and Graham as Judges in the court-house are different men from Judges Allen and Graham in a Board of Managers, prosecuting Judges. I appeal from them as Managers, to them as men and Judges; I appeal from them when inflamed with the passions of prosecutors, to them as possessed of calm reason; "I appeal from Philip drunk to Philip sober." I see around me gentlemen of high judicial aspirations, and for years I have sympathized with them, and bade them God speed in the race. But let me warn them to abandon forever their hopes, let this solemn scene which we are now enacting turn them aside from their designs; for, no matter how honorable they may be, how able they are, they are certain to err at some time, and the termination of their career will be disgrace, provided the opposite political party, with a majority in the House, should consider that it was necessary to impeach them, and look around for some point in their career to serve as an excuse. Conviction in this case, my friends, of an honest error, would be high authority for the Senate of North Carolina to proceed upon, and justify a verdict of guilty. On one occasion before a great Judge in England, this transaction took place. Mr. Erskine was asking the Judge for a remedy in behalf of his client, and he turned to him and said, "Erskine, why do you not send your client into Chancery for relief?" The brilliant advocate replied, "May it please your Honor, would you send a dog you loved there?" If the law insisted upon by these learned Managers were the law in North Carolina, I for one would not put a dog that I loved upon the Superior Court bench.

Who, looking back on the history of the revolutions that have taken place in politics in the last few years in this State, would dare occupy a position on the bench? The judiciary would be filled by that class of persons which is de-

scribed in the Arabic proverb as those who know not, and know not that they know not, commonly called in our language, fools; or those who have no self-respect to preserve, no good name to hand down to posterity, and therefore none to lose. Remember, Senators, from the high position which you occupy, statesmen, lawyers, Judges of the highest Court of North Carolina, that you are making history here, and setting precedents for the guidance of future generations. This doctrine of the Manager elevates folly, and strikes down wisdom, degrades honor, and sets a price upon dishonor. An independent judiciary, my friends, the learned Manager wants, and does not see that the necessary result of his teaching is that it would either degrade the judiciary, or destroy it altogether.

This teaching not only outrages the living, but wrongs the dead, and carries desolation with it into the future. The glory of North Carolina has been her Judiciary, not her orators and statesmen. We have had no speakers like Henry, Prentiss and Preston. We have had no Senators like Webster, Clay and Calhoun, but we have had Gaston, Ruffin and Pearson, and they stand with Marshall and Taney in the estimation of the world. And yet, none of these were infallible. I have not the slightest doubt that if you read their history you will find that they all made mistakes in their decisions, either in their opinion or that of their fellows, and by their own confession. And certainly, in the long flight of years, at some time you can have found a House of Representatives who happened to disagree with them.

The hour of 6 o'clock having arrived, the President adjourns Court until to-morrow morning at 10 o'clock.

SIXTEENTH DAY.

SENATE CHAMBER,

Wednesday, March 27, 1901.

The Court of Impeachment meets pursuant to adjournment at 10 o'clock a. m., and is called to order by the President.

The roll of Senators is called and the following answer to their names:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

Mr. OSBORNE, resuming his remarks, says:

It is wonderful what positions have been taken in impeachment trials. Let me pause to tell you that the great and tranquil soul of Washington himself was disturbed upon this subject by a hostile party in the House of Congress, when, in accordance with his oath of office, as he considered it, he refused to surrender the papers entrusted to his honor with reference to the British treaty.

Senators, let us do full justice to the living. If you should convict Judges Furches and Douglas of high crimes and misdemeanors, for a mere mistake, then let us render also the same judgment against the dead. After you have entered your verdict here, let us complete the verdict—let us go over to our Supreme Court Library and write below the pictures of the great Judges that hang upon those walls, the single word, "Impeachable." Let us turn to the volumes of

our Supreme Court Reports, and see the eulogies which have been delivered upon our great dead, and let us write at the end of each eulogy, "He was guilty of high crimes and misdemeanors." Aye, let us go to their tombs, and carve in the eternal stone under their epitaphs these words, "They broke their oath of office; they violated the Constitution and the laws, and should have been disgraced and removed from office."

But another thought occurs to me. What is the decision of a Judge? It is nothing but his opinion embodied in writing. What is an honest decision? It is his honest opinion. When you convict men then for uttering honest opinions when the law compels them to pronounce some opinion, for a Judge can not be silent on the bench and be true to his oath, but must speak or write, if you convict him, I say, for speaking or writing that which he honestly believes to be the law, what are the Managers and their counsel asking you to do but prosecute men for uttering an honest thought? In other words, to punish him for his opinion's sake. A prosecution for an honest opinion, when some opinion has to be uttered under the law, is a persecution in a free country. Speech and action are free here to men with the just limitation that they shall not injure one's neighbors. But thought here is as free as the wind—it bloweth where it listeth—and where a man is commanded to express his thoughts by the law, it is his right and duty to express his honest and not his dishonest thought. This is a persecution, for in the form in which it is presented in the argument, it is a prosecution for the expression of an honest opinion. It is not so charged in the articles, but it is presented in these speeches.

My friends, in advocating this doctrine, do not imagine for one moment the society in which they find themselves, and those who now share and in the past shared with them a full belief in such a doctrine. Amiable, upright gentlemen as they are, if they thought for one moment who their mental

associates had been in the past, they would withdraw forever from that society. It is not the glorious company of martyrs. That doctrine, sirs, is taught and enforced, as I understand, in China at this day, and in all the effete kingdoms and empires in the East. There are a few advocates of it in Russia, and it is the prevailing belief in Turkey. It was taught long years ago by Nero in Rome, and, to illustrate his meaning, he lighted the streets of the Eternal City with the burning bodies of Christians. It was taught by that splendid apostle, Torquemado, and his Court was the dungeon of the Inquisition; and the witnesses to the truth of that doctrine were the cries he wrung from his victims. It was again enforced by Philip the Second, and the Duke of Alva, as is written in the blood of the people of the Netherlands. It found an eloquent expounder in Bloody Mary, and was demonstrated by the fires at Smithfield. Again, it was taught by the Stuarts in Scotland, and enforced by the thumb-screw and rack and boot, and its truth manifested by the heroic Covenanters. One of its most splendid teachers was the Bloody Jeffreys of England, and one of the results of that doctrine was the burning of Cranmer. By it, the inspired tinker, the author of "The Pilgrim's Progress," was imprisoned for twelve long years, and the heroic Baxter, the author of "The Saint's Rest," was put into the pillory by reason of its enforcement. But that doctrine was dethroned years since, and we had flattered ourselves that it was gone forever. It was abandoned, sirs, when our ancestors left their native country, and settled in the wilderness, that they might have the right to express their religious thought with perfect freedom. Indeed, that a man should have a right to express an honest opinion upon any question of law, or upon religion, when called on and commanded by his God and by the law to speak, is really the corner-stone of this great Republic. And when you abandon this idea, you absolutely overthrow freedom and religion, destroy liberty in a Judge, and establish a tyranny in their stead.

But, sirs, it the boast of the Managers that they pay special consideration to the Constitution of North Carolina, and one would think from their argument that their counsel have a monopoly of devotion thereto. A special object of their adoration is section 8, Art. I. That is the section they consider the Judges have violated. It is that the three departments of government, the Executive, Judicial and the Legislative, should be kept distinct. Though the government of this Commonwealth is built after the model of the English form, the analogy fails in completeness by virtue of the section I have just quoted. In England there is a commingling of the Legislative and Judicial powers in the Houses of Parliament. The House of Lords is a court of last resort, which hears the final appeal on the causes decided by the regularly established courts of the land. Acts of Parliament themselves may take the form of judgments, and deprive men of life, of liberty and of property without what we in this free country would term "due process of law." Our ancestors thought that out of such a form of government there might arise a tyranny based upon the majority, and therefore they embodied their will in the Constitution that their Legislature should not be supreme in the State. They would not give the Judges supreme power, because that would have been an oligarchy; they would not give it to the Executive, because that would have been an autocracy, a despotism. If you, Senators, had a right to condemn Judges under the law of the land, because they had given honest judgments, then you are the supreme judicial power of the State, and can revise any judgment made by the Supreme Court by an impeachment and conviction. I submit, Senators, if it had been the intention of the promoters of the Constitution to lodge that power with you, instead of organizing you into a Court of Impeachment, as provided in Art. IV, they would have simply followed the model of the English Constitution and created this body a court of last resort. In that case, as

a matter of course, this question would be before you upon an appeal, and the argument of counsel for the Managers on the other side would be absolutely logical and just. If you differed from the Judges, it would be your duty to reverse them. If you could pass on the question whether they had made an error, and no matter whether that error was honest or not, you would be obliged to reverse them, and your adjudication of that question would be final. But, to follow the argument of the learned Managers, if you convict a Judge of an honest error, then indeed, the Judicial Department is not supreme in matters concerning it, but you would be the supreme judicial power in the State. There would be a commingling of the legislative and judicial powers, and section 8, Art. I, of the Constitution, would be blotted out and destroyed. To sum up, where does this doctrine lead us? In the first place, it would compel a Judge to violate his oath of office, a true interpretation of that oath being that he would decide the law in accordance with his views, and not according to the views of others, that is, according to the judgment of the Legislature of North Carolina, and especially the Senators. Or he would be forsworn when he took the oath, swearing to infallibility. You would be persecuting him for an honest opinion, which would be cruel and unjust. You would obliterate forever a distinction marked in the Constitution between the departments of government, and repeal section 8, Art. I, of that Constitution—and all this results simply from forgetting in our zeal for conviction and following after false gods, an old maxim of the law that no man can be convicted of any offence without a guilty intent. I know that the Managers are not without authority for the position they have taken, but they can find no authority for such a position in the Supreme Court of North Carolina. *State v. McLean* does not sustain them in that, because that was an act forbidding positively and unequivocally the removal of a tombstone. Of course there was a guilty

intent in that case, because the intent was to do the thing which is forbidden by the law. In *State v. Hatch* is no authority, because the Commissioners in that case were guilty of negligence, and negligence is forbidden by the law. I think myself that if a Judge was guilty of gross negligence in deciding a case, and the opinion was palpably wrong, that he might be convicted. Criminal acts always involve a guilty intent. Sometimes indeed, the intent is to do the act which is forbidden. Sometimes the statute forbids an act, coupled with an intent qualifying the act. Thus it is forbidden to sell liquor in North Carolina without a license. He who sells liquor in North Carolina without a license can not be heard to say that he did it with no guilty intent, because the guilty intent in the law is to do the act forbidden by the law. The question is always, what is forbidden by the law? False pretence is obtaining things of value by false representations, for the purpose of defrauding. The thing forbidden by the law is the act, coupled with an intent, to-wit, an intent to defraud. The intent then must be established, as well as the act of false representation. The act and the intent forbidden taken together, is that which is contrary to the law, and prohibited by the statute. Selling mortgaged property with intent to hinder and delay and defraud the mortgagee is a misdemeanor under the laws of North Carolina. The statute forbids the act of the sale, coupled with the intent, as I have described. The statute does not forbid the act alone, but forbids the act when accompanied with the intent. Therefore, the act is to be established and the intent also, for the two taken together, is what the law forbids to be done. Now apply the principle to the Judges. What does the statute forbid? Misconduct in office. What is misconduct in office? It is to decide that to be the law which the Judge does not think is the law. He must make his decision from some impure motive, that is the thing which is forbidden. You must establish this, first

that he decided erroneously, and second, that he did it from an improper motive. The two acts taken together constitute a violation of the law, the thing done, and the intent with which it is done. When you establish these facts, then you establish the fact that he intended to do that which the law prohibited.

But, as I have said, the Managers are not without precedents, but they are only precedents in the ordinary use of the term; that is, that they have preceded the learned Managers in sustaining the doctrine, in order of time. They have gone before, and the Managers have followed them. The fact is, in the history of this country it has been advocated by Managers in nearly every impeachment. It was advocated at the trial of Judge Prescott, and defeated by the argument of Daniel Webster. It was advocated again, and completely overthrown by William Wirt, in the trial of Judge Peck; and among the Senators in that case who sat as Judges, we find the name of the great Webster, who, as a Judge, decided the law as he had maintained it to be as an advocate. Indeed, the theory of the prosecution in this case was strongly presented, as Judge Allen says, by the Managers in the impeachment of President Johnson. But it was refuted by a verdict of "Not guilty" in the Senate, and that before a body of partisans. Chiefest and prominent among the advocates of that doctrine, my Southern friends, of all others, was the Hon. Benjamin F. Butler, commonly known among us as the Beast. And it may be that he carried the same spirit of persecution that he manifested to the people of New Orleans, when endeavoring to destroy their rights and liberties, into the impeachment of President Johnson, when he was endeavoring to destroy him. He was consistent, at least, in all his life, if I have read his biography aright. But such is not true with my honorable friends over the way. They differ entirely in character from the authority which they quote. They are amiable, honorable, merciful gentlemen,

on the outside of this senatorial body. But inside, they feel themselves constrained to advocate what I know to be disagreeable to their natures, a harsh and cruel doctrine. But the honorable Manager who cited the authority of General Butler, who simply in advocating this doctrine, acted after his kind, forgets that that distinguished gentleman received a complete castigation at the hands of Benjamin R. Curtis, William S. Groesbeck, Mr. Evarts, and the Attorney-General, Mr. Stanbury, who resigned his place to defend the injured President. I could easily quote passages from these speeches to justify me in any assertion, but I do not wish to weary you.

My friend, the Manager, may follow Mr. Butler, but as for the Judges and their counsel, we prefer the godlike Webster, Wirt and Curtis. But it is proper and right that, having discussed this question according to the light of my own understanding, that I should summon to my aid the intellect of others. Therefore, I place my hand on Bishop's Criminal Law, and read from the following:

(1st Bishop, 573; 2d Bishop, page ...)

And again I read from the 107 N. C., page 921:

State v. Cansler, 75 N. C.

State v. McIntyre, 3d Iredell, 171.

But strongest of all is the *State v. Powers,* 75th N. C., page 281. I read from the 283d page:

"Now it is so well settled," says the learned Judge, "that there is nothing to the contrary that an officer who has to exercise his judgment, or discretion, is not liable, criminally, for any error which he commits, provided he acts honestly."

I read this, Senators, on account of the force and clearness of the expression. It is exactly the opposite of that which was read in your presence at the beginning of this trial by the learned Manager. It contradicts the doctrine advocated by Butler in the impeachment of Andrew Johnson. It seems

to limit the question of criminal intent to those acts of an officer wherein he is called to exercise discretion, and not judgment. But it is not the language here. The fact is that discretion and judgment are the same thing. The discretion must be honest, and the judgment must be honest, or the act which follows the judgment and discretion is indictable and impeachable in a Judge.

I have not studied all the authorities that have been cited by the Managers in this case, for the simple reason that it has been done by one before me, in a masterly way. But I venture this assertion, that in not a single writer upon Constitutional law will you find that doctrine sustained, if you read all that the writer says upon the subject. Disjointed passages there may be, which, while presenting the argument on that side of the question, may seem to sustain their view. But, sirs, perusing further, you will soon find the answer to the argument, and that in the conclusion of the author. I can but pause here to show you how far sometimes gentlemen, in arguing a cause, may make a mistake by not citing all that a Judge may say concerning a particular subject in his opinion. The case of *Ewart v. Jones,* reported in the 116 N. C., page 570, was read to you by counsel on the other side, and the reason why it was read, I suppose, was because if the Chief Justice, who delivered the opinion, were alive to-day, he would of necessity, have to be sitting beside the respondents: "Under our form of government," says he, "the sovereign power resides with the people, and is exercised by their representatives in the General Assembly." Of course I know, Senators, that you are well aware of the fact that the sovereign power in North Carolina resides in the people themselves. But listen, the counsel read only one sentence, and forgot the next one which follows it: "The only limitation of this power is found in the organic law as declared by the delegates of the people in convention assembled from time to time." The organic law is the Constitu-

tion of North Carolina, and the Constitution represents the will of the people.

But now, having maintained at some length the proposition that you ought not, and therefore can not, convict these respondents for a mere error in law, provided that error was an honest one, I shall proceed to show you that, in the first place, they made no error, and maintain, in the second place, that if you yourselves are reasonably doubtful whether they did make an error or not, you must acquit, and further maintain the proposition that if you should find beyond a reasonable doubt that they made a mistake and erred in their judgment, the prosecution must go further, and establish beyond a reasonable doubt the further fact that they wilfully erred. With these simple propositions behind me, well known to the lawyers of the Senate, and well understood by the laymen, let me analyze in a few sentences, the substance of these articles of impeachment.

The first two relate entirely to the issuing of the mandamus in *White v. The Auditor*. The fifth article relates to what is known as the office-holding cases. The first article charges that the mandamus was issued in violation of section 8, Art. I, of the Constitution, which I have already quoted to you; section 9, Art. IV, which is that the Supreme Court shall have original jurisdiction to hear claims against the State, but their judgment shall be only recommendatory, and no process in the nature of an execution shall issue thereon; and section 3, Art. XIV, which provides in effect, that no money shall be paid out of the treasury of North Carolina except in consequence of an appropriation made by law, which means an act of the Legislature.

The second article charges that the mandamus was issued in violation of chapter 21, of the Laws of 1899. The third article, which is, in my opinion, simply demurrable, and ought to have been stricken out, charges that the mandamus was issued in violation of a certain resolution passed by the House of Representatives, at its June session. That is a

simple resolution appointing a committee to inquire if any money had been paid to Theophilus White. It is no prohibition on the part of the General Assembly to the Treasurer against paying the claim. It is simply a resolution to appoint a Committee of Inquiry. Such resolution might be considered as evidence bearing on the question of intent. It can not be used as a statute upon which can be predicated an article of impeachment for the Judges who violate the resolution in issuing the mandamus, inasmuch as that resolution does not forbid it.

Art. IV has five specification. The first specification, in part, is included in Article I. I shall not trouble the Senate with debating this question twice. The next two specifications charge the Judges with issuing the mandamus, contrary to the course and practice of the Courts of North Carolina. The fourth specification charges them with violating chapters 19 and 21 of the Laws of 1899. I shall discuss this specification in my discussion of Articles I and II. The fifth specification charges the Judges with violating the law in refusing to allow the dissenting opinion of Judge Clark to be published in the volume of the Supreme Court Reports.

And the fifth article, relating entirely to the office-holding cases,charges that the Judges in rendering their decision,acted with the intention of bringing the Legislature into disrepute and public scandal. The rest of the charge contained in this article relates entirely to the issue of the mandamus.

Recurring then to Article I, that charges the violation of section 8, Art. I; section 9, Art. IV; section 3, Art. XIV. The entire charge is involved in the alleged violation of Art. XIV, section 3. Art. XIV provides that no money shall be paid out of the treasury except on account of appropriation made by law. Art. IV, section 9, provides that the Supreme Court shall have original jurisdiction in cases against the State, and that the judgment shall be recommendatory, and no process in the nature of an execution shall issue thereon.

Art. I, section 8, provides that the Supreme Judicial, the Legislative and Executive powers of the State, shall be kept separate and distinct.

You can see that the question turns, as I have said, upon whether there was an appropriation. If there was an appropriation, then section 3, Art. IV, is not violated, because that provides that there shall be no payment except in consequence of an appropriation by law, and that if there was an appropriation, the payment was in consequence of it, and therefore no violation of the section, but absolutely in accordance with it. If there was an appropriation, and a salary to which the payment could be applied, under the appropriation, and money set apart in the treasury to pay it, then section 9, Art. IV, is not violated, because it is not a claim against the State in the sense of the word in which it is used in that section. The claim against the State is a claim adverse to the State, a claim which the Legislature of North Carolina has failed to appropriate money to pay, or a claim which it is resisting constitutionally—a claim which the Legislature denies in accordance with the Constitution.

Gentlemen read with great force and emphasis from certain decisions of the United States Supreme Court, to the effect that a proceeding against the officers of a State by mandamus, is a proceeding against the State itself. The cases cited are *Cunningham v. Mason,* 109 U. S., 254; *Haygood v. Southern,* 107 U. S., 169. I do not deem it necessary to repeat here the language of either one of these decisions. I take these propositions of the law there announced to be so clearly admitted by lawyers that I, for one, would not condescend to deny them. No one knows better than the learned Manager that Art. IV, section 9, of the Constitution of North Carolina, nor in fact any section of any article of any Constitution of any State in the Union, was passed upon by the Court in those cases. The United States Supreme

Court always takes the construction of a State Constitution or a statute of a State from the highest legal tribunal in the State itself, and that construction, whatever it may be, governs the Supreme Court of the United States in its decisions upon such section of the Constitution or statute. What was before the Court was the construction of the 11th amendment of the Constitution of the United States, and the question before that august tribunal was whether a proceeding in the nature of a mandamus begun in a Circuit Court of the United States was such a proceeding as fell within the inhibition of that amendment. Now let me read from the amendment: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted by one of the United States by citizens of another State or by citizens or subjects of a foreign State." These actions were brought by citizens of other States against the officers of a State commanding them to perform official functions on behalf of the State, according to the dictates and desires of the United States Courts. In dealing with the officers of the State, the Courts of the United States recognize the principle of State sovereignty, and consider that the State itself has absolute control of the conduct of those officers in carrying out and performing their official duties. In the great revolution it is indeed true that many of the elements of that sovereignty, which were so bravely defended by the people, were lost in the final result, and in the amendments to the Constitution which followed it. But amongst those elements which were preserved was the right to control and govern the conduct of its own officers. And the suit brought by those plaintiffs should have been brought, if brought at all, in the Courts of the State which the officers served. Furthermore, as I undersand these decisions, any right to recover any money on behalf of certain bonds issued by these States was absolutely denied or forbidden by statutes in the State. I do not elaborate the reason of the Su-

preme Court of the United States any further, for it is so plain a proposition that I could not deny it. No Court of the United States has the slightest control over the Treasurer of the State of North Carolina. Thus far, at least, its powers are invoked in behalf of a citizen of another State or foreign State. But, Senators, we must look for the construction of section 9, Art. I, to the Supreme Court of North Carolina. Before citing that case, let me ask one question. I do not ask for an answer at present, because I do not wish to be interrupted now. But I ask it of the learned gentleman who follows me. I shall ask of you, Senators, to answer it by your verdict. Is there any lawyer in North Carolina, save possibly in the prosecution of an impeachment case, who would maintain the proposition that in no case a mandamus will lie to make the Treasurer of North Carolina pay out funds in his hands as an officer of the State? If this proposition is maintained, and I understand it to be maintained, I do not mean to be disrespectful to my friends when I state to you, Senators, that none know better than themselves that it is a question that has been settled in this State for forty years, and that, under certain circumstances, the mandamus does lie. Indeed, so confident were certain friends of mine who have been so frequently mentioned here on the other side of this question, in the very position which has been disputed to-day, that they filed a petition for mandamus in the case of *Garner v. Worth.* It becomes important that I should read something to you from that case, and state to you the distinction drawn there between what is a claim against a State, where the original jurisdiction lies in the Supreme Court, and not in the Superior Court, and a claim upon which a mandamus will lie in in the Superior Court. The distinction is so clearly defined that it does seem to me it may be considered as a final adjudication upon the law in the matter.

Garner v. Worth, 122 N. C., pages 250 and 256: "The

Courts can not direct the State Treasurer to pay a claim against the State, however just and unquestionable, when there is no legislative appropriation to that purpose." Now that is a claim which is adverse to the State, as you see, the State not having admitted by an appropriation that the claim is due. And when there is such an appropriation, the coercive power is not applied to compel the payment of the State liability, but to compel the public officer to discharge his duty, by obedience to the legislative enactment; in other words, when there is an appropriation to pay a certain claim which the State acknowledges, and directs its officers to pay.

Again, reading page 257: "Even when a claim is 'an expense to the State Government,' or other subject of appropriation, as an expense of charitable or penal institution, for instance, the Court can only issue a mandamus." When? "When the amount is admitted or ascertained or stated by the statute, as a salary or other sum certain, *i. e.*, when the act to be done is merely ministerial, and not even then unless the money is in the treasury for that purpose." There Judge Clark, in fitting language, describes exactly where a mandamus lies, to-wit, when there is a salary; when there is an appropriation to pay the salary; when there is money in the treasury to pay it. In that case the mandamus lies to compel the officer to do his duty under the act of the Legislature making the appropriation.

The history of section 9, Art. IV, is very simple. Before the Constitution of 1868, there was no method by which a citizen who had a just claim against the State of North Carolina for work or labor done, or anything else, could have that claim adjusted before any Court, either upon its legal merits, or as to the amount due.

Section 9, Art. IV, was enacted into our laws for the purpose of giving a citizen this opportunity. Now, Senators, it is a simple thing. Let us suppose that someone has done some labor for the State, and there is no appropriation to

pay for the labor, and he were to come to one of your lawyers here and ask you, "How shall I get my money?" You would bring him to the Auditor first, and ask him for a warrant. He would look at the statutes of North Carolina, and finding no appropriation, he would say, "I can not issue a warrant." You would say to him, "Not finding an appropriation, will you not recommend to the next Legislature to pay it, in accordance with the statute, if you think the claim is just?" He would respond, "I do not think that the claim is just." You would then say to your client, "There is no remedy except to go before the Supreme Court, under Art. IV, section 9." You would then issue your summons to the Governor; you would file your complaint, and the Governor would file his answer. The Court, if it desired the assistance of a jury in passing upon the facts, would send the order down to be tried in Wake Superior Court, or wherever it suited it. The amount would be determined in the Court below, and certified up to the Supreme Court. They would pass then, if they saw proper, upon the justice and legality of the claim, or they could pass upon that before they sent down the query as to the amount. The Court then, in its recommendatory judgment, would decree, what? That an appropriation be made by the Legislature to pay the claim. Pursuing still the interest of your client, you would go before the Committee on Appropriations, and lay the judgment of the Supreme Court before it. That committee, if it saw proper, would recommend the enactment, and the Legislature, if it saw fit, would follow the recommendation, and the money would be appropriated. Now after the appropriation it has ceased to be a claim against the State. It has been recognized, and that by a constitutional act.

Let us go further. Your client has not obtained his money, but he has had an appropriation to pay it. You go again to the Auditor, who asks you to show him the statute making the appropriation, and you do so, and he answers: "I will

not pay this claim; I will not issue the warrant." Where lies your remedy? You must go to the Superior Court, which has the only original jurisdiction of a mandamus, and ask the coercive power of that Court to compel the officer to do his duty, as prescribed in the act of the Legislature. For, said Judge Pearson, in *Wilson v. Jenkins,* which I intend to comment on for another purpose, "The General Assembly has absolute control over the finances of the State. The public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly." I do not state that proposition as absolutely true, because as to whether the Auditor is a ministerial officer merely, or has a right to exercise discretion, depends, upon the duty which he is called upon to perform. In such a case you plainly could have a mandamus against the Auditor. It is true that in an orderly proceeding, you would perhaps be obliged to sue the Auditor first, in order to obtain his warrant on the Treasurer, inasmuch as the Treasurer can not pay any money out of the Treasury except upon the warrant of the Auditor. But after having obtained your warrant from the Auditor under the mandamus of the Court, you should go to the Treasurer and demand payment,and if he should refuse, you have a remedy, The amount has been determined, and if he refuse, you are entitled to your mandamus, provided there is money in the Treasury to meet the appropriation. The Treasurer's only answer could be, "I have no money." His duty is purely ministerial. He would have either to pay, or not to pay. He would have no discretion as to the amount to be paid. If there was no money in the treasury, his answer to the mandamus would be complete. It is true that in an orderly proceeding you would be compelled to sue the Auditor first, but if the Treasurer was willing to be made a party to the original suit in order to save costs, and time, simply with a view to ascertaining his duty, there being no question made as to misjoinder of parties, the Court would have original jurisdiction, as we very well know.

Now turn to the facts in the case of *White v. The Auditor,* and what do we see? There is no place to look for them, except in the case before the Supreme Court, and there you will find them agreed upon in a controversy without action. I may as well pause here to state that I consider that a fact, settled by the ruling of your worthy presiding officer, from which ruling there was no appeal taken to the Senate. There is no charge or attempt to charge that these Judges sitting on the bench knew aught about this case, except that which was presented in the record before them, as is presented day after day in every other case. Lawyers, honorable gentlemen, suppose you or I should go before the highest tribunal of our State, behind us our sworn oath to do our duties to that Court as well as to our clients, and with agreed statements of facts in a controversy without action, and the Court should say to us, Mr. Osborne—Mr. Justice, we suspect a fraud in this matter. Would you not feel, gentlemen, that you had been insulted by your Supreme Court, and that, without a cause?

In *Garner v. Worth,* plainly deciding that the writ of mandamus in case of an appropriation lies, do my friends still insist that you can not issue a mandamus on the Treasurer of North Carolina?

If you care to read *Russell v. Ayer,* in the dissenting opinion of Judge Clark, 120 N. C., page 197, you will find some interesting literature on the subject of mandamus. There you will find a very full list of the cases in which the writ has been issued, and against the Treasurer. *Cotton v. Ellis,* against the Governor, to pay out a salary or to order the Treasurer to pay it; *Wilson v. Jenkins,* a writ against the Treasurer was recognized; *Bailey v. Caldwell,* 68 N. C., page 472, the peremptory mandamus was issued. In *Burton v. Furman,* 116 N. C., it was decided that the writ could be issued on proper cause; in the 114 N. C., *Board of Education v. The State Board of Education,* page 320, Judge MacRae delivers the opinion, "The writ of mandamus, once

called a high prerogative writ, will never be issued except where its propriety is plain and beyond doubt. If there were funds in the treasury of defendant which it ought to apportion among the counties, according to law, and which it refused so to appropriate, the remedy here invoked would be the proper one; but in the absence of any allegation to that effect, and in the absence of any provision in the Constitution, or in the statutes requiring the defendant to make the apportionment of the money raised by taxes in the different counties and retained in their several treasuries, the defendant can not be compelled to do that which is not required of it by law." The Managers quote only the first sentence of this passage, that the mandamus writ was once called a high prerogative writ, and would never be issued, except when its propriety is beyond a doubt. They do this for the purpose, I apprehend, of impressing on the Senate that perhaps it is a high prerogative writ yet. Here, though, is a clear statement that where there is a fund in the treasury in the hands of certain officers, such as the State Board of Education, which it ought to apportion in the counties, a mandamus would lie.

Now, is not that all that we have been contending for? Again, if the Managers had cared to look attentively at the case of *Burton v. Furman,* 116 N. C., they would have seen that though this writ was once a high prerogative writ, it has now ceased to be, and is an ordinary writ of right.

I think from the citation of the authorities that I have just given, that we may consider these propositions as settled; that if Theophilus White was an officer of the State and his salary was fixed by law, if there was an appropriation to pay the salary and there was money in the treasury to pay the same, then a mandamus lay against the Auditor of the State to compel him to issue a warrant in his favor to pay that salary. And he was entitled to further mandamus to compel the Treasurer to honor the warrant by paying it. In this

argument, for the moment, I shall assume that Theophilus White was an officer of the State, inasmuch as the learned Manager who opened this case seems to have admitted it, but for the further reason that the Supreme Court of North Carolina had determined that he was the true officer at the term of the Court previous to the decision in *White v. Auditor*. If I am mistaken, however, in the conclusion drawn by the Manager for the prosecution at this step of the proceeding, I must assume that the decision of the Court determining that he was an officer is in accordance with the law, for the reason that the discussion of that case logically ought to be made when I reach Article V in my argument. Histrionically, I know that I ought to discuss *White v. Hill,* the case which determined the rights of Theophilus White to his office, before discussing the mandamus case; but inasmuch as the House of Representatives have denounced the office-holding cases, and particularly *White v. Hill,* as illegal, in the fifth article, out of respect for the Managers I shall make the order of my discussion follow the order of the accusation. Theophilus White, then, was a legal officer of the State of North Carolina at the time of the suit brought by him against the Auditor and Treasurer on December 4, 1899. The office of Chief Inspector of the Oyster Industry was created by the Legislature of 1897, chap. 13, and White was duly appointed to his office by the Governor of the State. The Legislature of '99, in chapter 18 of its laws, abolished his office, by chapter 19, of the same Legislature, according to the Court, the office was re-established again. The Legislature of '97, in the chapter aforesaid, made an appropriation to pay the salary of Theophilus White,which was fixed at $900 a year, out of the proceeds of what we will call for the sake of convenience, the oyster fund. The Legislature of '99, sec. 5, chap. 19, makes this specific appropriation of $400 a year to pay each one of seven Commissioners their salaries. Inasmuch as Theophilus White was determined to be an officer by

virtue of chapter 19, because it re-established his office, which he held under chapter 13 of the Laws of '97, he was entitled to draw his salary either under chapter 13 of the Laws of '97, or chapter 19 of the Laws of '99. Judge Starbuck, in the Superior Court, adjudged that he was entitled to the salary prescribed under chapter 13 of the Laws of '97. The Supreme Court, in reviewing his decision, affirmed the judgment, but modified it to this extent: that he was entitled to the salary prescribed by the Laws of '99, chap. 19.

Senators, up to this time I have shown that his salary was fixed by law, and there was an appropriation of money lying in the treasury to pay the salary, the last fact stated being admitted in the controversy without action in the agreed state of facts which guided the Supreme Court in its decision. But I understand my opponents to deny that there was any money in the treasury at that time beyond $500, and the Court ought to have taken notice of the fact, although it was not called to their attention, because section 14 of the Act of '97, was not repealed by chapter 18 of the Laws of '99, section 14 provides that on the last day of November of each year all moneys of the oyster fund in excess of $500 shall be turned into the school fund. Inasmuch as the learned Managers contend that section was not repealed, then the Court should see that under no circumstances on December 4th, when the action was brought, could there be more than $500 in the treasury. In the first place, the Managers are utterly wrong in their construction of section 14 of the Laws of '97. It does provide exactly what he says, but it means that $500 must be kept in the treasury after the expenses are paid—expenses first, and amongst them salaries; after that, the school fund, and then the balance of $500 left in the treasury. I am a little surprised that my acute friends have either not seen this construction, or have been under the impression that probably the counsel on this side could not see it. But chapter 19, sec. 5, that is the section now

which makes the last appropriation, is the revenue act as to the payments of money in that fund.

Now I will read the section: (Here reads section.)

You must see, taking section 5 of chapter 19, to govern and control our decision in this matter, that that section provides for the payment of the salary and the expenses of the officers appointed under the act, and Theophilus White being one of those officers, I do not mean by name, but by the construction of the Court, inasmuch as that act restored his office, was entitled to pay under chapter 19, sec. 5. White, indeed, is in office to-day under chapter 19, sec. 14, of the Laws of '99. Chapter 19 is an amendment to the Laws of 1897. This section 5 of chap. 19, of the Laws of '99, and section 14 of chap. 13, of the Laws of '97, must be construed together and under any construction the salary of the officer must be paid just as one of the expenses of carrying on the business, and the balance left after paying expenses, except the $500, must be paid into the school fund.

I hardly believe that the learned Manager who made the first argument in this case was exactly certain on this point. The Supreme Court, therefore, could not see, and did not see, that there was only $500 in the oyster fund on December 4th. It depended upon the question as to whether the expenses of the business and the salary of the officers had been paid before that time. The two acts bearing on the question of appropriation taken together do not require that everything should be paid out of that fund into the school fund, except the $500. It is earnestly contended that chapter 1, however, forbade the payment of any money to Theophilus White, and the Legislature intended to prevent his receiving a salary, even if that salary was declared by law, and if he were decided by the Court to be an officer of the State and thereby entitled to it. As far as I am individually concerned I have no hesitancy in saying that the intention of the Legislature was to prevent White obtaining any money; and I am

justified in so saying, by the speech of the eloquent member from Buncombe; he agrees with me that they did not intend to let White have any money if we could help it. But admitting that to be our intention, Chapter 21 would be unconstitutional and void under *Hoke v. Henderson,* 15 N. C., . . ; *Cotton v. Ellis,* . . . . . ; *Bunting v. Gales,* . . . . . ; *King v. Hunter,* . . . . . ; *Bailey v. Caldwell,* . . . . . But the Judges of the Supreme Court decline to give an unconstitutional construction to chapter 21 when, by the language it uses, it is susceptible of a constitutional construction.

Now listen to the Statute: (Reads Statute.)

The Court had decided that White's office was re-established by chapter 19. That part of chapter 19 which re-established the duty of Theophilus White re-established his office insomuch as it proposed to transfer that office to another when thus re-established, the act is void under *Hoke v. Henderson.* The Legislature can abolish an office, created by the Legislature, but has not the constitutional right to leave the office in existence and transfer it to another. As his office was re-established by chapter 19, he was serving under that act, and authorized by it to do service under it. If so, chapter 21 had no application to his case. There was nothing in its provision to prevent his payment.

But again, the Managers tell us that by chapter 19, sec. 9, the Legislature prescribed a method by which the employees under this act should be paid. And inasmuch as the act prescribed an impossible method of payment, the Court had no right to issue the mandamus. In the first place, it does not prescribe an impossible method. Judge Furches, in *White v. Auditor,* having in his mind that the Court had decided that White was entitled to the office of the chairman of the Board of Shell-Fish Commissioners, does not decide that the Legislature intended to prevent him being paid, he decides that the method of payment out of the fund was a mere detail. Really, the Legislature of '99 had supplied an

omission of the Act of '97; that act prescribed no particular method by which the money should be disbursed. Inasmuch as the Act of '99 could not be literally complied with, it ought to be carried out as near as may be; Theophilus White should approve the accounts and the Secretary of his Board should countersign them.

But suppose the act really prescribed an impossible method by which White was to be paid; in what position do we find him? He is an officer with a fixed salary and an appropriation to pay him. The money was in the treasury, according to the admitted facts. There is nothing in this evidence to show that there was not a sufficient sum lying in the treasury to pay Theophilus White when the mandamus was applied for on December 4th. The Legislature could not take his office from him, either directly or indirectly, by abolishing his salary, or by repealing an appropriation to pay that salary. An act of that character is an act to starve out the officer, and is absolutely unconstitutional and void. *Cotton v. Ellis,* 42 N. C., ..; *Busby v. Yates,* .....; *King v. Hunter,* 75 N. C., ..; *Bailey v. Caldwell,* 68 N. C., ...

Judge Furches, as an upright Judge, was obliged to give a constitutional construction to chapter 19, as far as he could, and he did so. He decided that the Legislature did not intend to starve an officer out of his office. The eloquent Manager from Buncombe, who has every virtue that belongs to the great family of truth, tells us in his speech in the House, that the intention of the Legislature of '99 was to prevent White from getting any money. As I said before, I quite agree with him, but only go further and state, as I am compelled to state, that the section which was enacted to carry out our intentions was unconstitutional and utterly void. An unconstitutional law is no law. It is just as if it were written in the sands on the seashore, or I had traced it with my finger in the vacant air. It may be unconstitutional for the Legislature to repeal a salary, and it is equally unconstitu-

tional for the Legislature to repeal an appropriation to pay that salary. The gentlemen speak as if the Legislature has absolute control of the purse-strings of the people and the treasury of the State. When the purse-strings of the people have been opened and money collected therefrom, the Legislatur is not absolute in either respect. They are limited in the amount of taxes to be levied by the Constitution, Art. V, sec. 1. They are limited in their expenditures after the taxes have been collected and placed in the treasury. For instance, suppose the Legislature of North Carolina should pass an act appropriating money in the treasury to the payment of the interest on the special tax bonds which are repudiated in section 6, Art. I, of the Constitution, do you not know that the Courts of North Carolina would have a right to restrain the Treasurer from obeying the act of the Legislature? If they have not control absolutely in making expenditures out of the treasury, they have neither control absolutely in forbidding money to be paid out of the treasury. They can not spend our money through an unconstitutional act, and they can not forbid its expenditure by an unconstitutional act. *Shaffer v. Jenkins,* 72 N. C., . ., has been read to you; *Wilson v. Jenkins,* in the 72d N. C., has been read to you; now hear the language of *Wilson v. Jenkinss* (Reads from case.)

There is no absolute power in this Commonwealth in any department of the government; none represents the will of the people without limitations. Against the arbitrary exercise of power at the expense of individual liberty and vested rights, the Courts can always interpose the broad shield of the Constitution. Upon it, battered as it has been by many Legislative assaults, and as it always will be, when that body runs wild with political excitement, you will still find this sacred inscription: "No person ought to be taken, imprisoned, or disseized of his freehold, liberty, or privileges, or outlawed, or exiled or in any manner deprived of the right, liberty, or property, except according to the law of the land."

And a law of the land is not a Legislative enactment within the meaning of this section. It was that inscription on the shield which the great constitutional lawyer interpreted for us sixty years ago in the great case of *Hoke v. Henderson.* It was the interpretation there given that Theophilus White invoked in his behalf before the Supreme Court of North Carolina to protect him in his property; and because that Court gave him the benefit of that section, two members stand here impeached to-day. But the Court would not, and should not, have issued a mandamus unless as a matter of fact the money appropriated by the Legislature was in the treasury at the time the suit was brought against the Auditor and Treasurer, for it is a complete answer to a mandamus against the Treasurer that there is no money to satisfy the claim. In a trial before the Superior Court that would have been a fact to be determined before a jury if the fact had been denied; but that is admitted in the case agreed, and Judges Furches and Douglas could do nothing else than try the case before them.

Again, I understand our friends to say that no mandamus should have issued, even if there was a salary due, an appropriation to pay it, and the funds in the treasury sufficient to pay it, because the duty of the Auditor was not ministerial simply, but discretionary in some respects. It was thus far ministerial and thus far discretionary; as to the salary, the issuing of the warrant was a pure ministerial act, because the salary is fixed by law, just as much fixed as that of the Governor. As to the mileage, it was discretionary as to the average number of miles that Theophilus White had travelled. The Auditor had to examine into and determine that amount, and it required him to pass and to audit it; but he refused to exercise his discretion at all. When an officer declines to exercise his discretion he can be compelled to do so by writ of mandamus, for which I cite the case of *Burton v. Furman,* 116 N. C.

Examine now the writ and see what it commands him to do. You see that it commands him to exercise his discretion and to issue a warrant after having examined into the matter and determined the amount that is due according to the method prescribed by the Court; the mandamus does not tell him what amount to find due, but simply orders him to do his duty and to exercise his discretion in determining the amount and then issue his warrant; after the warrant was issued the Treasurer had no discretion; his duty was simply ministerial; he either was obliged to pay or not to pay.

But passing to Article III:

I do not understand the managers to claim that this is more than a piece of evidence bearing upon the intention of the Judges in showing disrespect to the Legislature of '99, and therefore shall not discuss it. As to the first specification in Article IV that declares that the mandamus was issued contrary to section 9, Art. IV, of the Constitution, that has already been considered.

Then, as to the second and third specifications, I am at a loss to know what the Managers meant exactly by these specifications; I shall adopt my own interpretation. The best way to settle the question as to whether the writ was issued in wilful disregard of the statutory provision in relation to the application of the writs of mandamus, is by a reference to the decisions. (Section 623 of The Code.) The objection that there should be a complaint under oath is simply contradictory of the sections with reference to a mandamus. The fourth specification has been fully discussed. The specification that the Judge was not allowed to file a dissenting opinion in the Auditor's case, and that therefore these Judges ought to be impeached for not permitting it, is answered by simply an appeal to the course and practice of the Courts. Colonel Kenan testified before you that he had never known since he had been Clerk of the Court, of a case where a Judge had filed a dissenting opinion or protest, as I understand it,

when there was no action of the Court against which to protest or to dissent from. In the first place, there had been a long dissenting opinion already filed; and though I am perfectly willing to acknowledge the right of Judge Clark to dissent from the opinion of the Court whenever he pleases, yet, I do not see where he obtained the constitutional right to keep on dissenting, and especially when there was no opinion written from which to dissent. It seems to me that you might as well impeach these Judges if Judge Clark had demanded the right to fill the next volume of the Supreme Court not only with the second dissenting opinion, but the third and fourth, because if you once admit the principle that he can write two on the same subject, pray tell me where is the constitutional limit that stops him? I say that Judge Clark had the right to write one dissenting opinion and to file it, but where in the world did he get the right to write two and to have them filed and printed? There is no authority in this country for the impeachment of a Judge for refusing to allow his associate to file two dissenting opinions upon the same question; and that is what is claimed by Judge Clark in this case. The case of the impeachment of Judge ...., from Pennsylvania, is cited as authority for this specification. I fail to see the analogy between the two. In that case the Judge who sat with the respondent desired to charge the grand jury, and Judge ..... wilfully left the bench and forced an adjournment of the Court to prevent his associate from being heard. On another occasion, as I comprehend the facts in that case, he told the jury that the charge of his associate was to be absolutely disregarded and not considered by them. For such arrogance, such tyranny and such contempt of his associate for wilfully adjourning the Court without any cause for the purpose of manifesting his contempt for his associate, he was impeached and properly convicted.

Article V in effect charges that the respondents in order

to bring into contempt, public scandal and disrepute, the Legislature of '99 did declare in certain decisions of the Supreme Court, called office-holding cases, acts of the Legislature unconstitutional. You have heard so much discussion on this subject that I deem it only necessary for me to sum up in a brief way the reasoning of the Court in order to justify the Judges in these decisions. If those cases are based upon well-recognized opinions, delivered by great Judges and acquiesced in for a number of years, and the conclusions arrived at by these respondents are correct, the logical deduction from the principles denounced in this opinion, then there is no man in the Senate can feel himself justified in voting for the conviction of these respondents. They all rest upon the principles involved in the case of *Hoke v. Henderson,* decided in the year 1833, and one other principle equally well settled, that statutes concerning one and the same subject must be construed together, and that is the doctrine of *in pari materia.* As to the principles decided in *Hoke v. Henderson,* let me give you a simple summary of them. It is decided that an office is property, and in the language of the opinion, "is as much the property of the office-holder as the land that he tills, and the horse that he plows;" that the property is acquired by virtue of an implied contract between the Legislature which appoints him and the office-holder who accepts the office. That the contract is subject to certain conditions: First, the Legislature has a perfect right to abolish the office at will; to reduce his salary; to increase his duties; that it has no right to leave an office in existence and turn it over to some one else; that it has no right to starve him out of his office. The first application of these principles for many years was made in *Wood v. Bellamy,* decided in the 120th N. C.; but the political faith of the parties against whom the decision was made was that of these two respondents. The Legislature of '97 repealed the charters of our charitable institutions and re-enacted them again

in the same act; they abolished the Board of Directors and set them up again in the same act, under the name of Trustees. They abolished the office of Superintendent, and set up that office again under the name of Chief Physician; the other officers and attendants were to be appointed by the Trustees, save and except probably the Assistant Physician. The Legislature expressly repealed the charter and abolished the office. There could be no doubt about the expression of the intention in so far as that body could reduce its intent to writing; there was no room for other construction from the language itself. But the Court decided that inasmuch as they transferred the duties of these officers to others under different names, that the action of the Legislature amounted to no more than change of the name of the office, and not an abolition of the office. The offices were not abolished so long as the duties were left substantially in existence and the transfer of these duties from one person to another while the office was in existence was unconstitutional and void. The result of that decision was to retain the asylums in Democratic hands, to keep in our officers and keep out the Republicans.

The next decision is what is called *State Prison v. Day,* 124 N. C. Captain Day had been appointed by Governor Russell to fill out the unexpired term of John R. Smith. The Legislature, for reasons which we need not discuss, concluded that it would take the control and management of the Penitentiary from the appointee of the Governor and confer it upon an appointee of their own. I do not see that in this case the action of the Legislature was based upon political reasons or partisan motives, because a majority of that body were of the same political faith as the appointee. They acknowledged the abilities of the appointee in his profession as a lawyer, but did not believe that he was exactly qualified for the position of Superintendent of the Penitentiary. The event has proved by the successful management of the

institution that the Legislature in coming to such a conclusion made a mistake. In order to accomplish its object the Legislature in the same act which had abolished the office, set up a Board of Directors to perform his duties, with some additional powers not incident to his position. The Superintendent declining to surrender his office to these Directors, a suit was brought upon an agreed state of facts before the Superior Court and carried by appeal to the Supreme Court and decided in favor of the Superintendent. The Court places its decisions again upon the principles of *Hoke v. Henderson* as interpreted and applied in the case of *Wood v. Bellamy,* in the year 1897. The Court did not decide that the Directors were not entitled to the offices to which they were appointed, but it did decide that they were not entitled to Day's office; that inasmuch as the duties of the Superintendent had simply been transferred to them that office was living and in their hands, and that as long as the office was alive, Day had the right to hold it until the end of his term. The essence of the office is the duties to be performed by the officer. He has a right to perform them, and a property right under *Hoke v. Henderson;* and that being the case, the Legislature, I repeat, had no right to transfer those duties to another, though they had a right to abolish the office altogether.

The only difference in the facts in Day's case and the Asylum cases is this: In Day's case the duties of the office of Superintendent were transferred to three persons instead of one. In the Asylum cases the duties of the nine Directors were transferred to nine Trustees; but does anyone doubt for one moment if the duties had been transferred to ten or more that the Court would have been compelled to decide upon the same reasoning that the nine Directors were as much entitled to their offices as if they had been transferred to just nine men. Separate in your minds for one moment a single officer of the nine Directors; do you suppose that any one of the ten could have sued and recovered his particular office

from him? The Court indeed would have decided that some one of the ten was entitled to an office, and added that one to the Board of Directors; but would not have decided that all ten were entitled to the offices of the nine. Suppose instead of one Chief Physician, the Acts of '97 had appointed two, with the same duties as the one Superintendent; the Court might have decided probably an additional person had been added to aid the Superintendent in the performance of his duties, but would never have decided that the old office had been abolished, because his duties had been divided; what possible difference is there between transferring the duties of an office filled by one person to three and transferring them to one. The office is transferred from the owner thereof, and is still existing in their possession. The wrong to the office-holder is the same, no matter how numerous the persons to whom it is transferred. The office is his as long as it exists. It belongs to him by virtue of the contract under which he took it. "It is as much his as his horse or his land." It is as great a wrong to him to give his horse or land to three men as it is to give them to one man. It seems, therefore, that the Court stood upon principle in the decision. I have heard that in the middle of the beautiful estate of Vanderbilt, in Buncombe County, there lies a small tract of land owned by an humble colored man. It is his own, under the laws of the State; he has become attached to it because it is the home of his childhood. Many times its value has been offered him, but he refuses to part with it. It is his vested right, and not all the wealth of the Vanderbilts can take one inch of the territory without his consent. An act of the Legislature is powerless to deprive him of it, unless it were taken for the public good and paid for. He would invoke the protection of the Court of his country against such an act, and fall back upon that provision of the bill of rights that no man shall be disseized of his freehold but according to the law of the land. That is the provision that protects

every humble home in North Carolina. It is the provision which has given such force and effect in the case of *Hoke v. Henderson.* It was that provision which protected Capt. Day and his right, and Theophilus White. That brings me to the decision of the principles laid down in *Abbott v. Beddingfield.* Dr. Abbott was one of the Railroad Commissioners; the office of the other two had expired, one by limitation, and the other by resignation. The Railroad Commission was abolished by an act of the Legislature of '99, chap. 506, and a Corporation Commission was established by another act of that Legislature, chap. 164. Both of these acts were to go into effect with an interval of one day between them. Chapter 164 repealed the Act of '91, creating the Railroad Commission, and the Acts of '97, which amended the Act of '91, and added additional powers and duties to the said Commission. Chapter 506, which established the Corporation Commission, instead of the Railroad Commission, added new duties to the Corporation Commission. In the same act it was provided, however, that the Corporation Commission should have all the powers and duties of the Railroad Commission, as defined and conferred in the Acts of '91 and the Acts of '97. In order to arrive at the intention of the Legislature in all these acts, the Court construed them together, inasmuch as they were all concerning the same subject-matter, and construing these acts together they could see, as anyone else can see, by looking at them, that the office of Railroad Commissioner had not been abolished, nor was it the intention of the Legislature to do so, but simply transfer the office to a Corporation Commissioner. This case, of course, stands upon a different principle from Capt. Day's, inasmuch as Day's office was abolished by one act and set up in the same act, where Dr. Abbott's office was abolished in one act and set up in another. Now, the defendant's counsel endeavored to sustain two propositions: First, that the office of Beddingfield was not the same office

as Dr. Abbott's, inasmuch as new powers and duties had been annexed. The next proposition was, that conceding that the addition of new duties does not abolish an office, yet, there was an interval of one day between the abolition of Dr. Abbott's office and the creation of Mr. Beddingfield's; that for that one day Dr. Abbott's office had ceased to exist. Answering the first proposition of Mr. Beddingfield's counsel, that adding new duties to an old office abolishes that office, I have only to say, that it is settled in *Hoke v. Henderson* that it is perfectly in the power of the Legislature to add new duties to an office without interfering with the rights of the property of the officer, nor does it abolish the office. Indeed, gentlemen, you will have no trouble in seeing this principle that prescribing new duties to an office in nowise abolishes the office. But the principal question was whether the *hiatus* between the operation of chapter 164, which abolished the office, and chapter 506, creating it, resulted in a destruction of the office. I would be uncandid if for one moment I contended that during that *hiatus* the office had not ceased to exist. But the Court had to determine the intention of the Legislature when it abolished the office in terms, just as they had to determine what the Legislature meant when in Bellamy's case it said it abolished the office; and inasmuch as it set it up in twenty-four hours after it had abolished it, was not the intent in the minds of the Legislature to set it up again?

What possible reason could there be accomplished for the public good to abolish Abbott's office for twenty-four hours and set it up immediately afterwards, unless it was done for the purpose of transferring Abbott's office to somebody else. And I appeal to the candor of the gentlemen who sit before me, had you sat on the Supreme bench of North Carolina, looking at these two acts together, would you not have said that that was the intention of the Legislature? Conceding that Abbott's office had ceased to exist for twenty-four hours, is

it not plain to your mind that it was recreated by chapter 164? Is it not further plain to your minds that chapter 91, though expressly repealed by 506 of the Laws of '99, was re-enacted by section 23, subsection 2, chap. 164, which provided that the Corporation Commission should have all the powers and duties which had been conferred upon the Railroad Commission? The Court in passing upon the question of the intent of the Legislature was confronted by a rule of well-known statutory construction, and that is what is called the doctrine of *in paria materia,* which means that all acts concerning the same subject-matter must be construed together. It has been recognized in so many various cases in the State that our Supreme Court Reports are full of it, and by so many Supreme Court Justices of all political parties, that I thought it, too, was a rule which lawyers knew. It is recognized in *Winslow v. Morton,* 118 N. C., pages 491 and 492, and *Rhodes v. Lewis,* 80 N. C., 137 and 139; *State v. Woodside,* 31 N. C., 496; *State v. Williams,* 117 N. C., 753, 754; recognized again in *Railroad v. Jenkins,* 65 N. C., 173; *Holmes v. Sackett,* 61, page 68; *Simonton v. Lanier,* 71 N. C., pages 498, 502.

Probably the strongest language has been used by Judge Bynum in *Simonton* v. *Lanier.* The first rule in statutory construction is, though made at different times, and not referring to each other, if *in pari materia* they are to be taken together as one system and explanatory of each other. "In this case the learned Judge went so far as to construe a private act and a public act together. Now, if they are parts of one system, and they are, then the Act of '91, the Act of '97, chap. 506, the repealing act of the Laws of '99, and chapter 164, the recreating act of '99, are all parts of some system; one harmonious whole. Looking at the entire system, taken together, the conclusion of the Court is irresistible, that the Legislature of '99 did not intend to abolish the office of Railroad Commissioner, but to suspend its existence

twenty-four hours and set it up again in the person of Mr. Beddingfield. If that is true, the effect of the act is simply to transfer Dr. Abbott's property to Mr. Beddingfield, which is unconstitutional under *Hoke v. Henderson.* In *Muller v. Commissioners,* 81 N. C., 171 and 176, which construes all the acts from 1835 down to 1883, skipping over a period of forty years, and taking up even the repealing acts, the Court declared that they must be taken together. But probably the best way to settle this case is by reference to the case of *State v. Bell,* 25th N. C., page 506. "All acts passed at the same session of the Legislature are to be construed as one act, says the Judge; it is an ancient rule that has prevailed for ages, and still must be adhered to by us." *State v. Melton and Bird,* 44 N. C., page 516, is to the same effect. This was an indictment against Melton and Bird on account of an alleged void marriage. This cites *State v. Bell* with approval. All acts previously in force were re-enacted in the Legislature of 1836, and they consequently constitute one act, though not passed on the same day. The last act on the subject-matter was that of 1838, and it is construed to be an amendment of the Act of 1836. In *Leach v. Snyder,* 108 N. C., 547, the doctrine of *in pari materia* is again recognized, but probably the strongest language on that subject, except that of Judge Bynum, is that of Southerland on Statutory Construction, section 288.

Now, Senators, is the Court to be blamed for following precedents that have existed so long in North Carolina, that are still a rule of the Court, and will continue to be so, as long as the English language is spoken. Therefore, when I stated in rather rough language the other day that I would not convict a dog on this testimony, I spoke earnestly, but I meant it. I do not now discuss *Wilson v. Jordan,* because that rests on the same principle as *Abbott v. Beddingfield;* nor is it necessary to discuss *White v. Hill,* for the simple reason that *White v. Hill* is a combination of the principles

determined in *Abbott v. Beddingfield,* and in Day's case. There was here an interval of three days between the abolition of White's office and its re-establishment between February 28th, as I remember, and March 2d, that is, only two days by the by; that now is Abbott's case repeated; and there was a transfer of White's office to seven Shell-Fish Commissioners, and that is Day's case, where the transfer was to three. If Day's case is right, then *White v. The Auditor* is sustained in one principle; it makes no difference how many men you may transfer an office to, so long as it exists the office is the property of the person from whom it was transferred. And *Abbott v. Beddingfield* settled the other principle; if the same Legislature abolishes an office and sets it up again after it is abolished, there being an interval of time between the operation of the two acts, yet, in the language of *State v. Bell,* the two acts are all one statute, and if they are one statute, the plain intention of the Legislature was not to abolish the office, but simply transfer it from one man to another. So I state in these office-holding cases, and I think I have convinced you, the Courts, but followed its decision in the case of *Wood v. Bellamy.* Now, as we pause and take a retrospect for a moment we see that all these cases rest upon the principles of *Hoke v. Henderson,* decided sixty-seven years ago. As we look at this structure reared by legal intellect, we perhaps may think that the superstructure far exceeds in dimensions the plan of the original architect; and if its symmetry is not perfect, if here and there a stone seems to be to you ajar, not fitting one upon another, that symmetry was marred in *Wood v. Bellamy.* That decision of the Court was made by force of the great argument of some of our greatest Democratic lawyers, Charles B. Aycock, R. O. Burton, Chief Justice Shepherd. I myself was one of those who advised that the doctrine of *Hoke v. Henderson* was applicable. But if there has been any departure from it I say that it was in that case first, and all the others are logical deductions

therefrom. The departure, if any, was when the Court decided that an office was not abolished when the Legislature declared that it was. In *Hoke v. Henderson* the Legislature did not pretend to abolish the office; it simply enacted that in two years there should be an election for the office, whereas Mr. Henderson, under the statute under which he was elected, was entitled to hold it for life. When my friend, Mr. Watson, in his cross-examination of Judge Montgomery, asked how would you get rid of an officer who had been elected for a long term of years, say forty, I answer him by a very simple plan: "The General Assembly of North Carolina do hereby enact that this office is abolished," and *stop there*. If he meant how would you get rid of an officer by Legislative enactment and keep the office alive, I do not know. And if he wants an answer I refer him to Judge Ruffin, and not Judge Douglas, because in *Hoke v. Henderson,* Henderson had already held his office for twenty-five years, and Judge Ruffin decided that you could not legislate him out of it and keep the office in existence for the balance of his term, which, according to the statute under which he was elected, was during good behavior; and from all I have heard on the subject I think he behaved very well for the balance of his life.

But recurring again to *Abbott v. Beddingfield,* you will remember that it is contended that the Acts of '91 and '97 were repealed and blotted out of existence. All the powers conferred upon the Railroad Commission by those acts were gone, and Judge Simonton held that inasmuch as those acts were repealed and out of existence that the Corporation Commission had none of the powers conferred upon the Railroad Commission. Amongst those powers which had been blotted out of existence was the power to assess railroad property. But by virtue of the decision of the Chief Justice of North Carolina in that case and Judge Douglas, who concurred with him, the Acts of '91 and '97, though they had been re-

pealed, were re-enacted and conferred the powers on the Corporation Commission which had theretofore belonged to the Railroad Commission. The effect of that decision was to give the present Corporation Commission the power to assess railroads for taxation; and Judge Simonton, under a rule adopted by the Courts of the United States, that they follow the decisions of the highest tribunal of the State in construing the statutes of a State, reversed his judgment. It is therefore due to the principles announced in the case of *Abbott v. Beddingfield,* by our own Court, that the increased taxation of the railroads in North Carolina has been made possible. The Executive department and the Legislative have availed themselves of the principles decided by our Courts therein; we have received our money, and yet these two Judges stand here impeached to-day for that decision.

But in the same volume of the Reports in which the case *State v. Railroad* is decided, *Abbott v. Beddingfield* is decided, and the dissenting Judge delivered the opinion in the case. The facts of the *State v. Railroad* were these: Under the Act of '91, creating the Railroad Commission, there is a section which forbids the railroad company to give a free pass to anyone. The railroad stood indicted for granting such a pass; the pass was granted before the Act of '99, chap. 506, was enacted. Chapter 506, say the counsel for the prosecution, repeals the Act of '91, therefore, when the case came on to be tried the criminal act had been condoned, if their contention is true, because when a statute creating a criminal act has been repealed no one can be punished for commission of an act before the repeal. The repeal works an absolute pardoning of the offense. But you remember that the Court decided that by virtue of chapter 164, the Act of '91 was re-enacted and the *hiatus* of one day in its existence made no difference. Judge Clark in the case against the railroad affirms the judgment and states that such a *hiatus* in the existence of the statute makes no difference, and that because of

its re-enactment. Now there is one thing certain: if it makes no difference as to crime, and a thing which was criminal before the *hiatus* continues to be criminal in spite of the *hiatus,* then the office, the existence of which it is claimed by the other side was abolished by the *hiatus,* did not cease to exist. The principle which is applicable to one is applicable to another. But, Senators, I ask you now, looking over these decisions, will any of you say that upon these grave questions where the wisest and best of your profession differ, that beyond all reasonable doubt the Court erred. I do not think you can, because the very difference in our profession concerning them makes the doubt of their correctness a reasonable one. But suppose you should believe that the Court erred and that beyond a reasonable doubt, it is charged here that the Court made those decisions unmindful of their oaths and with a view to bring the Legislature into contempt. That means that they were inspired by political motives. The prosecutors allege and attempt to prove by evidence that these Judges were conscious of error. It is their duty to make that charge good beyond a reasonable doubt. You must, by the feeble light of evidence, look into the bosoms of these respondents and see clearly the motives which prompted them to violate their oaths. There are no moral X-rays by which we can penetrate the heart of men and discern to a certainty their emotions. Therefore, I do not claim that your conclusions could be reached to a certainty. We do not ask miracles, but we do say that the only light to guide us is the conduct of the Judges before and after rendering these decisions. The prosecutors seem to think they have found evidenve that the Judges knew that they had given erroneous decisions in the manner in which they gave their advice to Colonel Kenan to issue the mandamus. Both these respondents tell you that,in their opinions,their judgment on May 22, 1900, authorized the writ. They are not shirking responsibility before you; they tell you like men that is what they

meant to do at the time; and if they intended to do so in May and did it, they are just as responsible for the opinion they delivered then as in October, when they delivered no opinion at all. If they were honest in May they were just as honest in the fall. The season of the year had no effect on their integrity, but the Managers say that they shirked responsibility and would not give the order to Colonel Kenan, though asked several times by him for instruction; those are the speeches, now what is the evidence? Colonel Kenan tells you, and I suppose no one doubts for one moment that he wished to do his duty, that never at any one time did Judge Furches ever say anything, but, as the outspoken man that he is, "I think you ought to issue the writ." Judge Douglas, though not so bold as the Chief Justice, still expressed the same opinion. Where you can find any evidence here of shrinking from a public duty on account of a consciousness of error is beyond my comprehension. But the prosecution insists that the advice given was an order by the majority of the Court. Well, gentlemen, as far as Douglas is concerned he wrote down exactly what he did at the time, and I think that ought to settle it; and he says in his writing that it is not an order, and yet the prosecutors contend that it is an order, when the paper on its face shows that it is not. But no one claims that it is an order except the prosecutors; no witness ever swears that there was one made, not even Judge Clark himself. My friends on the other side seem very anxious to consider this an order; they insist that practically it is one, and say that the reason why the Court did not give it, was because they were afraid to give it, and the reason is they knew they were wrong. Do the Judges not tell you now that they would have issued the order if it had been applied for in the proper manner; that there was nothing before them as a Court; that if affidavits had been filed they would have had a rule served upon the Clerk and issued the writ; and if they assume the responsibility now, and always have

assumed it, what possibility can their failure to make an order have to do with the question? But let us take for granted that they were shrinking; timidity does not always show consciousness of guilt, that is not a universal rule, but depends upon temperament. The worst of men have courage, and the best are sometimes not bold, for courage, Senators, is congenital; it comes not from training; that teaches us how to act with appearance of courage under circumstances, but after all, it is but a counterfeit, it is not the pure gold. These respondents were not afraid of the worst that could befall them, and which has befallen them; for listen to the language of Chief Justice Furches, for these are neither the words of a braggard nor coward, but the manly expression of the heart of courage, of a man confident of his own integrity and willing to trust to the justice of his fellow-man. I know no greater enemy to individual liberty and property than a coward on the bench; and I rejoice that here I defend a brave man, as well as an honest one. But I suppose that the prosecutors mean that these gentlemen were afraid of impeachment, and therefore waited until November to act. As a matter of fact, Judge Clark tells you that, as far as he could judge from appearances, that neither one of them knew whether the writ had been issued or not; Judge Furches had gone home and did not return until the September Court; and as for Judge Douglas, it seems that he was very busy writing some opinions, so that when Mr. Harris' lawyer came before them, they sent for Colonel Kenan to find out whether the money had been paid or not; they wanted to find out the facts from him, showing that they did not know the facts. But I suppose all this testimony was introduced for the purpose of showing that these two Judges were afraid of impeachment that had been threatened them, and they proposed to wait until the adjournment of the Legislature of '99. Senators, the prosecutors may perhaps forget a very simple fact which you can not. You gentlemen had already been

elected to the Legislature in August; you were of the same political faith as the Legislature of '99, and you had absolute control of both Houses; but notwithstanding that knowledge was possessed by the two Judges, they did not hesitate to give the advice which they thought the Clerk of the Court was entitled to. They faltered not in the performance of their duty; they had taken the oath of office; they had sworn to their own hurt and changed not. But when men of high character stand charged with violating an oath as these respondents are charged here to-day, it is surely incumbent upon those who make the charge to show a motive for its violation. Men of high character, or reputation, which is the evidence of character, before violating such sacred obligations must have strong incentives to move them. They do not recklessly throw away the priceless jewel it has cost them years to win. They certainly will not do so in the mere wantonness of power. The House of Representatives well knew and recognized the principle when they charged these defendants with a violation of thir duty for the purpose of bringing the Legislature of '99 in disrepute. The meaning of that charge is simply that they did it because that Legislature was Democratic. A moment's glance to their judicial decisions will put an end to the charge forever. I deny the charge here, and I call upon the prosecutors to give you full proof of the foul accusation. What is the evidence of the existence of such a motive? There have been, while these respondents have occupied the offices that they do, according to their calculation, thirty-nine of the office-holding cases, and of these, more than one-half have been decided in favor of Democrats. And I say now they have never kept the old officer in when he was a Republican unless they were forced by their construction of *Hoke v. Henderson* to do so. They have never nullified an act concerning an office unless such nullification was based on that decision; and I challenge you, gentlemen on the other side, to produce a single case that

contradicts this assertion. Where a Republican had a right to invoke the principles of that decision they decided for him; where a Democrat had a right to invoke that principle they decided for him. In all that long line of office-holding cases the Democratic party got the better of their opponents before the Court. I can not, for one, see the slightest evidence of partisanship. Give me the Republican who decides in favor of a Democrat, and certainly I will not call him partisan. You may perhaps think so, or some of you, but that is not the impression that it makes upon the non-partisan mind.

The hour of 1 o'clock having arrived, the President adjourns Court until 3 o'clock.

AFTERNOON SESSION.

At 3 o'clock the Court reconvenes.

The roll is called and the following Senators answer to their names:

Senators Alexander, Arrington, Aycock, Broughton, Brown, Burroughs, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

Mr. OSBORNE, resuming his remarks, says:

When I have argued this question with Democrats I have heard them say, "Well, they could not help but decide for Democrats under the cases that were before them; the cases were too plain in our favor." I contradict that by the record. It is easy enough to make the accusation, but it is hard to prove. And in this particular instance it can not be proved, because it is not true. Let us take up the record of the Chief

Justice first, as he has been longer on the bench than Judge Douglas, then let us take up the record of both together when they are associated with each other; we will try them by their deeds, and not by the accusation of partisans. In 1894, after a record of honesty, economy, wisdom and justice, without a parallel in the history of any State in the Union, the Democratic party was defeated at the polls by a majority of twenty thousand, and that when we had the machinery of the election in our hands. Why the people of North Carolina turned their back on the great party which redeemed their State from dishonor and disgrace and made her name a proverb for integrity throughout the land, is beyond my ken. To use the famous figure of General Ransom, there had been nothing like such ingratitude to be found in the world since the repudiation of Jehovah by the Children of Israel, and the worship of Baal after God had brought them out of the House of Bondage across the desert and into the land of promise. The Houses of the Legislature were filled with faces strange to these walls, advocates of wild doctrine, in the language of the Roman historian, desirous of new things. In the lobbies of the Legislature were gathered a crowd of politicians hungry for offices which were well filled by competent Democrats. They demanded as their right that they should take charge of the institutions of our State, and, as a matter of course, their Legislature yielded, as it always does yield, to the demands of their own constituency. Now, a small majority in each House could do nothing to check the deluge. Laws after laws were passed for no purpose except to put Democrats out of office and Republicans and Populists in, without the slightest ground of complaint against the incumbents; but we still had the executive officers; the Governor and his Council. We had been elected for four years and there was no way known to man by which they could take our offices from us except by starving us out; and notwithstanding the Managers, that was unconstitutional. It fell to the lot of the

Executive department of our State to preserve the offices of the State and the public institutions. As I pause now I am reminded that all, or nearly all, of that cabinet are gone. The honest Carr, the chivalrous Coke, the wise and gallant Tate—there are but two besides myself left, Mr. Scarborough and Mr. Furman; those were sad days for Democracy indeed. The heat and burden thereof had to be borne by our Governor. It fell to my lot as Attorney-General to advise him—I know that this Senate does not imagine for one moment that I propose to boast of my performances. I did my duty under the law, as I understood it. The only bulwark upon which I could rely to check the flood was the judiciary of the State; and on your Supreme Court bench there happend to be one conservative, upright lawyer whom I knew, because I had practiced with him for years, and I was certain that he would decide according to the law of the land as he understood it; that man was the venerable Chief Justice whom you now have on trial. I did not know Judge Montgomery and Judge Faircloth, who had been also elected to the Supreme Court bench, consequently, I could not speculate as to their decisions. The first case that came before the Court was *Cook v. Meares.* Judge Meares had been a gallant Confederate soldier and was a fine criminal Judge and honorable gentleman. He had been long on the bench and was recognized as a fine presiding officer and a very efficient Judge of the Criminal Court of Mecklenburg and New Hanover. It is needless to say his record was a spotless one. His term had, I believe, expired; at any rate the Legislature had set up a Criminal Court for the Eastern Circuit of North Carolina, at the same time abolishing the Courts of New Hanover and Mecklenburg. They passed an act to that effect, but the Clerks of the Houses failed to hand it up for ratification until a few days after its passage; in the meantime Mr. Cook, a Republican, had been elected to the office of Judge. I advised Governor Carr that an election to an

office before it was created was void. In doing so I relied upon but one case in North Carolina, and that was where the people had elected a Treasurer before the County Commissioners had established the office. The learned counsel found another case from Massachusetts to sustain the doctrine; but there is not a layman or lawyer that could not but see that the point taken by myself was highly technical. Strong arguments were made on the Republican side of the question. A partisan Judge could have easily decided that the ratification of the act creating the office was the ratification of the election. That the Legislature, if it saw fit, could elect the man first, and create the office for him afterwards; that it could fit the office for the man as well as fit the man for the office. The case was decided in favor of Judge Meares and the Chief Justice wrote the opinion. Was Judge Furches a partisan then? The next important case was that of *Stanford v. Ellington.* Stanford was elected to fill the place of Mr. Ellington, of Johnston County, a Democrat, our Public Librarian. I advised, after much hesitation, and consultation with able lawyers, for I was not confident on the point myself, and had no North Carolina case to guide me, the Governor to reappoint Mr. Ellington. The point in this case was this, Senators: Mr. Stanford had been elected by the Legislature, but the roll-call in the House did not show a quorum at his election. I thought that it could reasonably be held that there was a presumption of a quorum, unless some one made the point of no quorum. But Governor Carr appointed Mr. Ellington and Mr. Stanford sued for the office. The Court again decided in favor of a Democrat, and the opinion was delivered by Judge Furches. In deciding that case, was my venerable friend influenced by partisan motives? But the decision in that case was far-reaching, as was well known at the time, for upon it depended the salvation of two public institutions—the Penitentiary and the Agricultural Department. It was Stanford's case and the decision therein

that saved those two institutions to us. Fellow Democrats, I ask you to-day, in the name of that justice which we all profess, at least, to love, inasmuch as the Chief Justice stood by the law for us in the hour of our trial, let us stand by it for him in the hour of his trial. It is true that in these cases we did not make the point of *Hoke v. Henderson,* because it was not applicable. Ellington's term had expired, and so had that of Judge Meares, according to my recollection; at any rate, none of the counsel made the point, and the Court was not to be blamed for not taking it. Thus you see that up to this time, in every act of his judicial life to '97, Judge Furches measured up to the highest standard which he had set before him in all his past life, if there is any confidence to be put in witnesses as to character. Two years passed by and then the revolution reached its flood-tide. The Democracy was crushed beneath a thirty-five thousand majority; great indeed was its fall; then you and I and all of us fell down. And experience, learned at the hands of the conservative court, had taught the combination a lesson; they knew how to elect officers, but one thing was beyond their talents, they had not learned how to repeal Art. I and section 17 of the Bill of Rights. They did not know how to take a man's office away from him and keep it in existence at the same time. They knew how to pretend to abolish offices by saying they had abolished them, and setting them up again; a great many Legislatures know how to do that. But they concluded to lay hands on the charitable institutions of the State; your insane asylums, your deaf and dumb and blind institutions—skillful, trained, honorable gentlemen who had the perfect confidence of the people in their tenderness and humanity, their judgment in the management of these institutions, had them in charge, but that availed nothing before the bitter partisan. The Legislature proceeded to abolish their charters and remove the officers as I have described before. They intended to legislate out of office Drs. Murphy, Kirby and

Miller, and the other Superintendents. The gloom of despair had settled on us, but in the gloom there was still one star of hope, and it shone upon the bench of the judiciary. Judge Douglas had been elected; his friends claimed for him that he too was an upright lawyer. Judge Montgomery was there and had proved his faith by his works. Judge Furches was there, and, Senators, you know from what I have told you, what you had a right to expect from him. Able counsel were employed by the Superintendents; every one of them of the Democratic faith; the learned Burton and brilliant Aycock, the great Shepherd, and others; and one whom modesty forbids me to call able. Out from the receptical in which it had slumbered for nearly fifteen years, we resurrected the great case of *Hoke v. Henderson,* and asked the Court in the name of the Constitution of North Carolina to proclaim again that an office was property; that a Legislature could abolish it, but that by no subterfuge and pretense, and we claim that the act on its face is but a pretended abolition; that the Legislature really intended to transfer the offices to their political friends. These respondents, with the late Chief Justice Faircloth and Judge Walter Clark, decided that *Hoke v. Henderson* was still the law in North Carolina and preserved our institutions. I ask you again, Senators, were these Judges partisan then? The same claim was made that was made in Day's case, *Abbott v. Beddingfield* and *Wilson v. Jordan,* where the Democratic party attempted to do the same thing that was done by the Populist Legislature of 1897; and because they decided those cases against us, is it just, or upright to decide them partisan now? You have the same Constitution in 1897; you have the decision of *Hoke v. Henderson,* a vital living principle in the law now as it was then; you have the same Judges Furches and Douglas; they are the same men, with the same character. If they were non-partisan then, they were non-partisan in their decision in 1899; but both of them swear on their oaths as

honest men that they never have been conscious of a single decision based on political motives. I insist that you should give them full credit for their oath in the light of their past history in confirmation of the oath. But we presented to you witness after witness as to the high personal character of these respondents; I have only to mention that they are all Democrats, as far as I know, and influential citizens in the State of North Carolina, who have travelled far to give willing testimony in behalf of a cause that seems to them just. I take but two examples, Col. Hamilton C. Jones and Major Robbins. There is no nobler spirit in all the world than that of Colonel Jones. They have both risked their lives for the Constitution as they understood it, and greater love than this hath no man than that he would lay down his life for his friend; and greater love than this hath no man for the Constitution and the laws of his State than that he would die to save them. "Go, passenger, and tell at Sparta that we died here in obedience to her laws," is the inscription at Thermopylae. But around me are gathered the beauty and chivalry of North Carolina looking upon a scene that will be remembered for many generations yet to come. Before me are assembled the most intellectual representatives of our people; on either side of me is collected her legal learning; but this scene is incomplete, and this trial in order to do perfect justice, needs witnesses that should be called for these respondents, but which can not be introduced. This hall would not contain them, for they are scattered all over the State of North Carolina. If I could, I would produce you the deaf and dumb and blind children of North Carolina, their silent voices and sightless eyes would speak for these respondents in tones far more eloquent than I could utter. And behind them I would gather all the friends of those whose minds have been touched with the spirit of infirmity and ask them to speak and tell us what they owe these respondents. And with united voices they would say to you that it was through their de-

votion to the great principles of the law, as expounded by the fathers, that it is due now that these poor unfortunates have been saved from the hand of the spoiler, and received the care and attention which the charity of this State has given to them. Humiliation and disgrace, removal from office, disfranchisement for men like these? Such men deserve to be crowned with honor, and live in the grateful remembrance of their countrymen. To sum up the case, all the noblest instincts of man demand the acquittal of these respondents. The law, because they have not broken it; justice, because they have been just; humanity, because they have been humane. I leave this case with you, reminding you that these are not alone on trial, but that you yourselves, and I too, are on trial; for myself, if I have failed, it is because I have not the ability, an honest cause is here, perhaps it has needed an abler advocate; you are on trial before yourselves, for I would not mention to you the bar of public opinion. If in after years, when the passions of this hour have subsided, and you should convict these men and then meet them, degraded as they will be, and stripped of the privileges of freemen and looking upon them you can coolly and calmly say they were guilty, they were foresworn, then indeed you can have the satisfaction of feeling and saying to yourself, though what I did was harsh, it was for my State and in accordance with her laws. But miserable indeed will be your reflection if, after a dispassionate view of your verdict, you should feel that you were misled or mistaken, carried away by zeal for party, unconscious though it be, you can but think, each of you, in the presence of the individual you have degraded, I, and not he, am condemned. In a matter of so great importance, there is but one tribunal I can appeal to, and that an unerring one as to you, your own conscience; before that tribunal I must, in the name of the law, summon each and every one of you. In the words of another, "political considerations are a false and hollow principle upon

which to reach conclusions in matters of judicature. In the language of Jennie Deans, after she had walked from Edinborough to London to obtain a pardon for her innocent sister, when talking to the Queen, "And, oh, my leddy, when you come to die, it will not be so much what you have done for yourself, but what you have done for ithers, that you would like to think upon." Do not for one moment imagine that I am begging for mercy; you must be true to the oath that you have taken, and will be, but it is a spectacle for the angels to look upon when justice and mercy can walk hand and hand together. In such a sublime scene you will have the opportunity which will never be presented again of being the chief actors. The world is your audience, and what you do here to-day is not limited to the vision of the immediate circle around you; present and future generations will look on this scene. I earnestly urge you to act as men worthy of the grand scene. Show to the world how North Carolinians act when they try their fellow-citizens under her laws, that no matter how zealous we may be on the hustings and the polling places for our party, a court of law here is still a court of justice, even for a political adversary. Let us prove ourselves worthy of the compliment that was paid to our State in the Supreme Court of the United States by the greatest lawyer and as great a patriot as ever was produced in America, Daniel Webster, when, pointing to her conservatism, her love of law, her respect for her judiciary, he commended her example to the State of Massachusetts as one to follow. I earnestly entreat, for your own sakes, to possess yourselves of reasons founded on truth and justice for the judgment you pronounce; reasons which will require no argument, no excitement, no regard to popular favor to render satisfactory to your consciences; reasons which you can appeal to in every crisis of your lives, and will be able to assure you in your last hour that you have not judged your fellow-creature without justice.

In the language of the great Cardinal of France, who found his country despised and weak, and elevated her to the highest pinnacle of greatness, when appealing to his King for his rights, "For Justice all place a temple, all seasons summer; for fifteen years while in these hands dwelt empire, the humblest vassal, the obscurest craftsman, the very leper shrinking from the sun and loathed by charity, might ask for justice; not with fawning tone and crawling mien kneeling for favors, but erect and loud as men demanding man's rights." In such an attitude I leave these defendants with you.

Mr. CYRUS W. WATSON began the closing speech in behalf of the Managers, speaking as follows:

Mr. President:—This long controversy is rapidly drawing to a close. The Managers, on the part of the House of Representatives, have assigned to me the duty of closing the argument for the people. I would have been glad had they entrusted this task into some abler hands. I have been here for all these days listening to testimony, listening to the argument of counsel, trying, in the line of my duty, to remember all that has been said; and it is a labor of no small importance. And I feel myself this afternoon, Senators, incapable of performing the duty assigned to me, both physically and mentally. I shall ask this Senate, sitting as a high Court of Impeachment, to bear with me, while I summon to this occasion all the strength I have for the performance of this duty. And if, in the course of this argument, I come to the conclusion that it is better for me not to conclude this afternoon, I shall beg indulgence of this Senate to take a recess, notwithstanding I know how anxious each member of this Court is to go to his home, to finish this work, and to go to his home. I remember how kind and indulgent you have been, each and every one of you, to counsel, under exactions that have almost seemed to amount to cruelty to the members of the Senate. I thank you for what you have done

for my associates, and the counsel for the respondents, and I beg you to indulge me as far as the argument of this question is concerned.

As far as the citation of authorities is concerned, there is not very much left for me to do. I am only left to gather what remains after the great arguments which have been submitted, and to present to you the case as best I see it, in a kind of summing up.

Senators, you have listened to the argument of counsel for the respondents, all of them, I believe, belonging to the same political organization to which I belong, save one. And I believe that I am justified in saying that that political adversary of mine is the only member of the great array of counsel for the respondents who has not felt called upon to visit opprobrium upon the Legislature of 1899. One of the counsel, the one who has last addressed you, has even felt justified in turning State's evidence against his fellow Representatives in that Legislature, called by Governor Jarvis the ablest Legislature that has assembled in this capitol since the war. He has stood up here and testified that the Legislature of 1899, in the passage of its various statutes regulating, or intending to regulate, the affairs of this State Government, was prompted by base political motives. He said that this Legislature of 1899 passed a great many statutes that were properly pronounced unconstitutional, because being violative of the Constitution of North Carolina were invalid statutes; that he helped to pass these statutes, numbers of which he drew with his own hand. He has almost said that he knew them to be unconstitutional when he helped to pass them. He said on yesterday that he would "appeal from Philip drunk to Philip sober." Before I take my seat, Senators, I will appeal from Counsel Osborne, representing these defendants, to Senator Osborne, acting as Senator under the sanction of an oath to support the Constitution of the United States and of the State of North Carolina. He has seen proper to-day

and yesterday to testify at large, as did Governor Jarvis the day before, not only as to the law, thereby avoiding the ruling of the President of this Court, rejecting expert testimony—not only testified as to what the law is, but they did it in such a manner, both of them, as that it came as their ruling as to what the law is. Both testified as to innumerable facts that weren't heretofore in testimony. The counsel who has just taken his seat not only goes into the facts relating to the legislation passed upon by the Supreme Court of which the House of Representatives complain, but he has gone so far as to tell this Senate that he is responsible for the appointment of nearly all these officers by the Governor under his recommendation.

Mr. Osborne has laid down the law. He has given you his opinion, as did Governor Jarvis the day before, as to what the law is. He has said to this Senate that this claim of White, in his opinion, as a lawyer, was not a claim against the State; each one of them have given that opinion. Each one of them has given an opinion to this Court, a personal opinion to this Court, that the Judges are not guilty, thus violating one of the plainest rules of professional ethics, that the employed lawyer is not to give his personal opinion while arguing his case. Neither one of these gentlemen is entitled to give you his personal opinion, for the reason that if he were sitting with you as a court of justice, you would not for a moment ask him for his personal opinion, when you ascertained that he had been disqualified as a member of this Court by receiving pay to influence his verdict.

Now, gentlemen, you have been told that the people of North Carolina are not behind the House of Representatives; you have been told that these articles of impeachment have been prepared by the House of Representatives, brought across into this chamber, and exhibited to this Senate, with the demand that these respondents be put upon trial; that they have done this of their own accord; that they did it be-

cause these respondents were Republicans, and because they were Democrats. You have been told that the people of North Carolina, nine-tenths of the white men of the State of North Carolina, and of this city, are disagreeing with the House of Representatives and are demanding at the hands of this Senate a verdict of "Not guilty" upon these articles. You are not only told it on this floor by the honorable counsel who represent these respondents, but, borrowing a word from Governor Jarvis on yesterday, it is being "whispered," not only whispered, but sounded into the ears of the members of this Senate within this capitol, on the streets of this city by the drum corps that hangs around the Yarborough House, under the leadership of its drum-major, night after night, dogging the footsteps of Senators as fast as they go from their labors to rest, with buglers of the press, one in this city, and one in another city in this State, sounding it out all over the land that the people are not behind this prosecution, the purpose of which is to influence this Senate. When this Court adjourns and goes to its home, it will ascertain whether these facts are true, or whether they were intended to deceive honest Senators and affect their verdict in this case. It is not only so in this trial, Senators, but it has been resorted to often before. It is an old trick. It has been resorted to in every impeachment trial since the foundation of this government, every single one. This is the second impeachment trial in North Carolina. The other was the impeachment of Governor Holden, nearly one-third of a century ago. Let us see what was said then—not said by counsel of the same political party as the Governor, but said by the man who was holding himself up before the Senate as the highest example of Democracy, as has been done here to-day.

Mr. Conigland said: "But the honorable manager (Mr. Sparrow) has told us, what I confess I had failed to discover, that this is not an attempt of a successful party, in the flush of their triumph, to depose from office one politically

obnoxious to them, but that it is the uprising of an outraged and oppressed people to vindicate the law. Sir, I tell him that he is mistaken. The people of North Carolina sent their Representatives here for no such purpose." (This is the impeachment of W. W. Holden.) "I am fresh from the people" (they are always fresh from the people), "and I know their sentiments fully as well as any man in this body." (Our friends know public sentiment better than all of this body put together.) "Whatever may have been the errors of Governor Holden, whatever may be the general opinion as to the course of his administration, the true men of the country—the property-holders of the country, the conservative portion of the people—"

I have read those words, "conservative portion of the people" in the newspapers of North Carolina until I have been trying to define what is the conservative and who are the conservative people of North Carolina. And just at this point, stopping this quotation a moment, I want to say that the conservative people of North Carolina are the very sort of people that make up these two Houses of the General Assembly of 1901. These Senators and Representatives came from the great middle class of the people of North Carolina. They are not the men who are engaged day by day in an earnest struggle to gather together large quantities of this world's goods, thinking of nothing else, hardly stopping to pray, much less to study government. They are not of that class of men who travel the most lowly walks of life, but they belong to that great middle class in the State of North Carolina that holds her true to her Constitution, and has done it through all time, neither looking up to the great nor down upon the lowly, but a class that stands between the two, taking care of both. And the men who are struggling for great fortunes in North Carolina, if they would stop for one moment and think, would know that the only protection to themselves and to their accumulations is the firm reliance upon

the very class of men that go into these Legislatures, and work night and day in order to give them good sound, safe government. That is the conservative. The conservative is the man who wants no change. He is the man who will not tolerate encroachment of one department of State Government upon the rights and functions of another. He is the man that discovers it first, and is the first to raise his hands to prevent it, and his voice to make it known. To continue the quotation:

"—the property-holders of the country, the conservative portion of the people, regard this impeachment as ill-advised, unwise and inexpedient. At a time when a political victory, almost without a parallel, filled them with the brightest hopes—"

Mr. Conigland surely lives, and was present here to-day, delivering the speech of Mr. Osborne.

"—they looked to this General Assembly for that practical wisdom in legislation which, by reforming the abuses of the past, would secure victory in the future—which would bind up the wounds of this dear old State and enable her to take a new departure in a career of happiness and prosperity. They desired peace, and you have given them strife; they asked for bread, you have given them a stone; they did not expect the energies of the House of Representatives to be exhausted and the time of that honorable body to be consumed, in an effort to remove William W. Holden from office."

The great lawyer, Governor Bragg, who closed the argument for the people in the Holden impeachment trial, used these words:

"The respondent has been held up here as above reproach in every respect. My eloquent friend before me (Mr. Conigland) passed upon him a studied eulogium.

"Again, at one time you have been told that in a trial by political votes, no material effect would be produced by a judgment on your part of conviction. At another time it has

been intimated to you that consequences of a serious character might follow in case you thought proper, according to your oath and best conviction, to pronounce judgment of guilty. In fact, every possible appeal has been made, not only to your judgment, but to your fairness, to your mercy, and even to your fears."

That was the conduct of the counsel for the respondents in the trial of W. W. Holden for high crimes and misdemeanors. That Senate returned a verdict of "Guilty." It pronounced a sentence removing him from office, and to forever disqualify him from holding office in the State of North Carolina. The Senate was threatened, after returning that verdict and pronouncing that sentence; it was declared that it would destroy the peace of the country, but for more than a quarter of a century following that verdict and judgment, we had profound peace and great prosperity in North Carolina.

My friend, Mr. Osborne, in his argument on yesterday, spoke of the surrender of Gen. Lee at Appomattox Court House, and said that on that occasion Gen. Grant proclaimed to the people of these United States, "Let us have peace." I happened to be present on that occasion, and my recollection is that he is a little mistaken as to when that proclamation of peace was made. It was never made by Grant, the soldier. It was made by Grant, the candidate for President of the United States, a few years later, and it was sounded from every hustings in the State of North Carolina, "The late commander of the armies of the United States has said to the people of the United States that you are tired of war, let us have peace." They elected General Grant President of the United States. During his term of office, these same people in these Southern States witnessed armed bands of soldiers, with fixed bayonets, marching into the capitols of Southern States, and driving out the representatives of the people at the point of the bayonet. "Let us have peace." You do not

want peace as long as error walks abroad in the land. You have got to make war upon it to preserve our free institutions for yourselves, and (which is much more important) for your children. Senators, it does not make so much difference to me, for my race is almost run. I have lived through trouble. I have marched for years, foot-sore and tired, with nothing but privations and hardships and dangers surrounding me. I have lived through times of peace. What little time I have yet to live, I can live under almost any government. But I feel that it is incumbent on me to see to it that this splendid government, torn from the hands of oppressors and built here for me, shall go down to my children unimpaired, with not a stone in the temple out of place, not one, standing in its beautiful symmetry as it was left by its organizers and builders more than one hundred years ago. That is why I am here, Senators. I did not care to come—I did not volunteer to come. I did not place my views in the public press ahead of investigation and discussion, not knowing myself anything about the question. I did not hang around the lobbies of the House of Representatives trying to prevent the result that came from the investigation the House of Representatives was making. I was off, attending to my business. I came here when called, and did not come at the first call, either.

But I am a Democrat. This thing, since Mr. Pou made his argument, has developed into a political discussion. I think it developed into a political discussion from the fact that when my Brother Pou stepped off the floor of the Senate chamber, he left nothing for argument on the other side. And I think that is the reason why the two counsel who have succeeded him have gone along in their personal reminiscences, and testified more as to facts, some of them away back in the long ago, and have come up here and denounced Democratic legislation. Because I do say that when this argument of Mr. Pou's was concluded, the case had been covered, and his

argument, in addition to what had been said before him left the position of the prosecution absolutely impregnable.

I stand here and speak to this Senate, not as a partisan, but I may say that I am a Democrat. I can not say that I have given all my life to the Democratic party. But I do say this, Senators, that for one-third of a century I have given all the time that was required of me, that was asked of me, to the Democratic party. And I have done it without reward or the hope of reward. And I believe, occupying that position, that I can speak with as much party authority as any gentleman who has preceded me. At the beck and call of every chairman of the State Executive Committee that has ever sat in this capitol, I have gone wherever he directed, and commencing at the earliest, more than thirty years ago, and continuing to the present day. And I defy you to find a man that ever put his hand into the funds furnished him for running the campaign, to pay even my traveling expenses.

I have said this much, gentlemen, as to my own position: One of the gentlemen has stood up here and talked to you about fighting for his country in those troublesome times, from 1861 to 1865. I guess I did some of that. The soil of more than one field in Virginia has been made red by my blood; and I came out of that conflict torn, maimed and disabled; and but for that I would not have been here to-day, because but for that I would never have been a member of the profession to which I belong. I have heard two distinguished men, two distinguished Democrats in North Carolina, men who have been often honored by that political organization, I have heard them stand up here upon this floor, Senators, and I have heard them denounce this prosecution as a political prosecution. I have heard them denounce the House of Representatives as having been governed by partisan considerations in preferring these articles of impeachment. I have heard them say that Senators upon this floor were expected to vote because of political considerations, when I knew, and

they knew, every one in this great presence knew, that their only hope of victory was that they were counting upon eleven men on the floor of this Senate already asleep, laid away safely in the bosom of these respondents. And when one of the counsel stood up yesterday and boasted of the five who voted against the impeachment of Andrew Johnson, I could see by the twinkle in his eye that he was boasting of that to stimulate the six here, if possible, to vote with the eleven-elect for acquittal. Not only was that passing through his mind, but the drum corps has been sounding it up and down these streets, and from the corridors of this capitol and the lobbies of the hotels, that they were already secure, *and naming them.* I can not believe it. I can not believe that an honorable man upon this floor will do anything else but to vote according to the law and the evidence, and the eleven who disagree with me in politics, some of whom know me, others do not, but those that do know me, know that while I stand here and speak to-day, that I have never been bitter; that I have never been unrelenting in my political course, but that I have always tried to be fair. And I stand here to-day and say that the greatest insult that can be offered to the eleven men upon this floor who disagree with me politically, is to claim that the eleven men are already safe, safe from the beginning. It was an outrageous insult to have started out with the conclusion that they were safe before the trial commenced.

I am replying now to speeches made by Democrats, and to testimony given by Democrats yesterday and to-day. I said awhile ago, that the only counsel for the respondents who has not reflected upon the House of Representatives, reflected upon the Legislature of 1899, was the honorable counsel who agrees with the respondents politically; the man who first opened this discussion with a most manly, courageous and fair argument, and one of great ability. I have that much to say for him. I have frequently asked myself how it hap-

pens that these things always take place in this way, and I have always concluded this: Why, a reasonable man who suffers himself to be placed in this unfortunate position always goes a bow shot beyond his associate whose political feelings are with the side he is advocating. It is because he is afraid there will be a suspicion that he has not quite done his duty. He is afraid that somebody will stand somewhere in the building and say that he was not entirely loyal to the side that employed him; and he goes over, and he fights harder than he would fight upon his own side; in the same way that a deserter from one army, who, going over to the other, always makes a greater reputation as a fighter after he turns his guns upon his own people.

Now, Mr. President and Senators, I will leave this subject, coming back to it after awhile, because I want to introduce two gentlemen who have discussed these issues before the Senate, as witnesses, before I quit. I propose to bring them here and cross-examine them before you; they are the two gentlemen that have spoken—to cross-examine them before you on some terrible questions that you have got to pass upon between now and to-morrow evening. But for the present I leave them, and I want to call your attention, Senators, to the facts upon which these respondents are charged with crime.

I have promised myself, Senators, that I will not further trespass upon you by reading from books, and I am only going to read a few little extracts now and then, that are very short, and each of them to the point.

Now, Mr. Long quoted early in the argument in this case from Judge Grover, of New York. The counsel on the other side will agree with me that he was one of New York's greatest Judges at the time he wrote the lines that I am now going to read to the Senate. He was then a member of the Court of Appeals of the State of New York, and, as such Court of Appeals, was sitting with the Senate of the State

of New York in passing upon the guilt or innocence of Judge Barnard, on trial charged with the commission of high crimes and misdemeanors under the Constitution and laws of the State of New York. After Judge Barnard had been convicted by a unanimous vote, after he had been sentenced, after sentence had been passed removing him from office by a unanimous vote of that high Court, the question then came up as to whether he deserved further punishment, and the President of that Senate, constituted as it was of magnificent men, great Judges, some of them, who have since that time been Chief Justices of the great Court of Appeals of New York, put the question to the Court, a motion of this sort: "The question now before the Court is, Shall George G. Barnard be disqualified to hold and enjoy any office of honor, trust or profit in this State?" And that was put to a vote. Numbers of the members of the Court, and notably the Judges, in giving their vote gave an explanation. Now, I say, Senators, that this doctrine laid down by Judge Grover, the great lawyer, the great Judge of New York Court of Appeals, a magnificent man, a man of the highest character, was in this language, and the only reason I call your attention to it, Senators, and ask you to hear it read, is because it chalks out the line for the government of men who are to pass upon the guilt or innocence of judicial officers:

"Judge Grover—Mr. President: I think I may be pardoned a few observations preliminary to giving the vote that I shall give upon this question. I concur with my associate that has preceded me that it is one of great responsibility, and yet it is a duty to meet it firmly. With the respondent I have had slight acquaintance, and so far as I have had any, our intercourse has been pleasant and agreeable. It has appeared upon this trial that he has now attained the age of only forty-two years; that for fifteen years he has been upon the bench; at the early age of twenty-seven he was elevated to the high and responsible position of Recorder of New

York, the presiding officer of a Court of extensive jurisdiction; I am happy to say from the votes we have given that his hands are unstained by bribery. Let it not be said hereafter of Judge Barnard that for the purpose of private gain, for filthy lucre, he has consented to pervert justice. I am happy to bear further testimony in favor of Judge Barnard, that upon the trial of criminal cases we have heard no complaint of his conduct. Upon the trial of important civil causes he has fairly and uprightly discharged the duty of a just Judge according to the best of his ability. The errors into which he has fallen are somewhat akin to some of the nobler virtues. I think that the votes upon these articles show that the errors into which he has fallen have originated from attachment to friends, from the idea that upon the bench he had the right to remember who were his friends and who were his enemies. It was remarked by one Senator during this trial that he designed to solemnize every Judge in the State. I hope that the result of this trial will not only solemnize every Judge in this State, but every man clothed with a public trust under the government, that all will have impressed upon their minds when they assume any function in behalf of the public, that all selfish considerations are to be discarded, all their ends the public good. The respondent's desire to aid friends has led to grave errors—errors, in my judgment, inexcusable. The evidence has satisfied me that Judge Barnard, although possessed of those genial qualities that have surrounded him with strongly-attached friends, was destitute of some qualities essential to the judicial character. I think it a great misfortune to Judge Barnard that at so early a period of his life he was elevated to the bench. I regard Judge Barnard, not a sinner above all men, but that he has been too ready and yielding to bad influences that surrounded him. I believe that if Judge Barnard had not gone upon the bench until a more mature age, had been surrounded by better influences, he would have ranked high among the Judges of the State; but unfortunately for him,

he went upon the bench when he did; he was surrounded by those influences to which he too readily yielded. The question now is, whether he shall ever have an opportunity to resume a judicial office. It is possible if he had committed offenses in a legislative or administrative capacity, I might be satisfied by removal only; but in that position, where the greatest integrity is to be exercised, where none should turn either to the right or left in the discharge of duty, from any consideration whatever; when the only inquiries should be: What is the law, what is right? and act accordingly. In this case, with the kindest feelings toward Judge Barnard, I am compelled to vote in the affirmative."

There you have a case, Senators, where the only offense was partiality—partiality shown upon the bench. Now, Senators, the House of Representatives charges these respondents that they have been partial on the bench. The House of Representatives charges these respondents with having rendered political opinions, one after another, culminating in the last act of putting the judicial hand into the public treasury. Now, Senators, I want to say this to you: I propose, in the course of what I have to say in the latter part of my argument, I propose to prove to you, if it has not already been proved to you, that that Court sat for two years recognizing political brethren, receiving political litigants when they came with open arms, with ready-made political opinions on hand, fawning like "greyhounds in the leash to be let loose at will." If I do not show this, then dismiss that part of the charge which is contained in the 5th article of impeachment from your minds.

Senators, if I were to be turned away from the line of argument, I would stop for a moment to defend these honorable Managers, for they have been attacked as unworthy men, coming here to present this prosecution. Who are they? They are the agents of the House of Representatives, sent here and armed with authority to conduct this prosecu-

tion with such counsel as they saw proper to employ. They are the agents of the House of Representatives. They are acting here according to the will of the House of Representatives, expressed by more than two-thirds majority. The House of Representatives comes directly from the people. They are more so than this Senate, for one Senator may represent two, three, four or more counties, but this House of Representatives comes with a man from every county in North Carolina, presumed to know the wishes of the people that sent him here to represent them, and they sat in the House of Representatives, and as I said, by more than two-thirds majority of that House, with the people of the whole State behind them, they sent these articles of impeachment to the Senate for investigation. What does it mean? Where did it start? It started in the campaign of 1900. I felt the other day like covering my face from the gaze of the multitude when I heard eminent counsel, men of great character in North Carolina, say, "Oh, yes, we did stand upon the hustings before the people and charge this high Court with partisanship, but that was in the midst of political excitement." You did do it; why, of course you did it, on every stump in North Carolina, and every one of *you* did it, charging this Court with gross partisanship. You said it in the presence and in the hearing of the freemen of North Carolina that sent you to occupy the seats you occupy to-day. It was one of the issues. One of the great issues that the Legislature of 1899 had made was the great amendment to the Constitution, looking to the restoration of peace and the securing of prosperity to this great Commonwealth. And every man who went upon the stump had to defend himself from this sort of charge, "why the Legislature of 1899 did pass the amendment, and did say that it did not disfranchise white men, but their books were filled with laws that the Supreme Court has already decided unconstitutional and void, and if they made a mistake in those cases they will

make a mistake in this case." How were we to meet it but by telling the truth, and saying, Yes, they did decide against the acts of the Legislature, but they were moved by partisan considerations to do it, and we sounded it in every township in North Carolina. Were we honest? Were we telling the truth, Senators, or were we gross and malignant slanderers of the respondents? If the time has come when the politicians can get on the stump and denounce the greatest Court of North Carolina as partisan when it is not true, it is time for the people who created the Court, who are always ready to stand by the Court—it is time that the people should impeach and abolish politicians, and drive them from the State. That is the way I feel about it. And I feel, Senators, like no man dare go upon the hustings and attack that Court unless he believes the accusation to be true. If he does believe it to be true, then it is cowardly for him to run into the bushes when the issue is presented.

Senators, I ask your indulgence while I read a dozen lines more, from the author of State Trials, Mr. Wharton. I read the concluding lines of his comment upon the conditions that brought about the impeachment of the Judges in the beginning of this century, charged with partisan conduct on the bench. I want to read you just this selection, words that are filled with wisdom—words that every Judge, every Justice of the Peace, every man who holds any judicial position in North Carolina, from the highest to the lowest, ought to have burnt into his mind and heart and soul, that he may avoid everything that brings disgrace and disrepute upon his office, in passing upon the rights of his fellow-men. After summing up, he says: "It has taught us that to the judiciary, as to the church, political consequence is moral peril, and that, though while occupying its own territory, its authority is sovereign and its edict supreme, the moment it oversteps the boundaries by which that territory is confined, the moment it canvasses for popular honor or executive favor, that

moment the magic of its power is gone, and it loses for itself those princely attributes with which it is by the Constitution invested, and for the community whose high conservative sanctions by which that Constitution is to be preserved. The moment the highest officer dares to remember party, that moment he loses the respect of the community." The very moment that he steps aside to serve political ends, he is guilty of an impeachable offence.

Why is this, Senators, that you may let a political offender pass? Why is it that you may condone for a time the appearance of evil and actual misconduct in an executive or legislative officer? And then, why is it that you can not afford to sit still, you can not pardon a judicial officer for having for one moment over-stepped the bounds of his authority? That is the truth, that is the great truth that ought to be instilled into every boy, into every young man, and into every man who has not already had it instilled into him, in the State of North Carolina, that is, as to their judicial officer, and especially to their highest judicial officers, you have to call a halt the very moment they cross the boundary line marked by the Constitution. Now, why is it you do it? It is because, as Judge Bynum said the other day, quoting from Sir William Jones, "It is because a judicial decree is irrevocable. It is as binding as the decrees of fate." As Sir William Jones says, "It is as binding as the decrees of fate were supposed to be binding upon heathen deities." The decision that was made in *White v. Hill,* the decision that was made in *White v. The Auditor,* go into the books; they go there as precedents. The Statutes of 1899 may be repealed by the Legislature of 1901, and no man can complain, but the decision of the highest Court in the State becomes first a precedent, indulge it, and it becomes a binding authority. It stands there through the ages, controlling rights of property; and it can not be changed by a change of Courts. The highest Court in this land, the Supreme Court of the

United States, has decided in numbers of cases, affirming and reaffirming the doctrine that if a contract is made in the State of North Carolina, while a decision of her Supreme Court is standing unreversed affecting that contract, that decision becomes irrevocable as to such contract made in accordance therewith. And although another Court may come along years afterwards, and reverse that decision and set it aside, annul it and adopt a new rule, it does not affect rights of property which have been acquired while it stood unreversed. The case of *White v. The Auditor* stands yonder unreversed. How many cases are to come in North Carolina that by an analogy ought to be governed by the doctrine laid down in *White v. The Auditor?* The doctrine laid down in *White v. The Auditor,* if any thing, is that while a fund is set apart by the Legislature for a special purpose, and a man make contracts with that in view, and knowing that to be true, that it becomes unconstitutional to undertake to nullify the law and withdraw the appropriation that had been made by legislative enactment. There have been knocking at the doors of this Legislature this very session hundreds of thousands of bonds issued upon the Western North Carolina Railroad in the olden time, alleging that at the time they were issued there was a statutory second mortgage placed upon certain stock owned by the State in the North Carolina Railroad Company, that that stock is drawing an interest greater than enough to pay interest on the bonds secured by a prior mortgage, and the balance is being turned into the treasury. Suppose one of these men would come to me and say to me under the light of *White v. The Auditor,* under the light of this decision, "I have gone and bought fifty thousand of those bonds, and under the light of that decision I require you to bring suit, and when the answer is made that the Legislature has altogether withdrawn that appropriation, the answer would be, Yes, but it is a sum set apart; it is now beginning to accumulate in the Treasury,

and I demand the payment upon my bonds. I would say it not only governs in a case like that, but in every analogous case whenever *White v. Auditor* is an authority.

Senators, before I become too tired to look up a book and read it to you intelligently, I desire to read one or two authorities I will use in the argument a little further on, that I may call your attention to it after having read it to you, that I may call your attention to it as I go on in my argument without being obliged to stop and read the book. I sometimes do these things with juries, and I ask you to permit me to do so now.

Senators, I understand that the case of *Boner v. Adams and Jenkins* has been partly read to you during this argument. I have not heard all of the argument that has been submitted. I went out and rested now and then. But I beg your indulgence while I reply to Mr. Osborne to a speech he made just before noon, where he said, and I ask you to remember it, where he said, "I do not think that the duties of the Auditor in *White v. The Auditor* were all ministerial. I admit that the duties were official and discretionary. The statute fixes it that way." There was no possibility for him to live before the Court denying that, because the line of decisions says so. The statute itself actually provides what his official duties are. Now, I want to read what Judge Reade says, and I beg you, Senators, to hear me while I do it; and I beg you to listen to what I say upon it, when I come to my argument, because I tell you that it has not only fixed the law, but it fixes the knowledge of the law upon this Court.

I am not going to read you a single authority, Senators, that was not taken by Judge Clark in that magnificent dissenting opinion of his in *White v. The Auditor,* and placed before the eyes of this Court, under their very noses; their attention being called to every one of these cases, and saying to them in thundering tones, Do not issue this writ, because if you do you violate the law, the well-established law of

North Carolina. It is like you sometimes hear a lawyer say to a witness on the stand, who testifies to something the lawyer thinks is entirely wrong, subjecting him to indictment for false swearing, the lawyer says, "Mr. Jones, are you positive about that now? I caution you, I put you on your guard. Will you say it took place that way? I caution you that there were bystanders," so that the witness can not be able to say when he comes on trial for perjury, "I did testify to it, but it was through inadvertence."

Now, Senators, I want to say this to you, just as Mr. Osborne said to-day. There is hardly anything that the counsel for the prosecution has been able to produce before this Court but what is to be found in the great dissenting opinion in *White v. The Auditor,* by Judge Walter Clark, because he had been through all the authorities, he had studied them, and satisfied himself that the great Court of North Carolina was about to violate the law, and he had gone through all those months of the winter of 1899, during that whole recess after that *advisari* had been taken, and he had gone through that library from top to bottom, and he had collected these authorities, so that when they came together to render that decision, he laid them before that Court, and he said to them, "Hear me, my friends, we had better not press this matter. We had better let this thing stand as it is. We had better let the matter be sent back to the Legislature that is nearly ready now to convene. This is the year 1900, and the Legislature is already elected. Let us leave this matter, and send it over to the next Legislature, and let them pass upon this question as to whether White shall receive payment out of that treasury. And if they decide he shall not, then that settles it for us, and we can retire with dignity." Did you hear his words? Did you hear that man's words? Was he talking like a Judge? Was he talking like a man who appreciated the high office in which the people of North Carolina had placed him? I ask you, Senators, if that is not so? Then

what position does he occupy? He occupies such a position that all the malignant arrows and poisoned shafts that may be thrown at him from any quarter in North Carolina will fall harmless at his feet. I stand here, Senators, to-day and say for him, that on this occasion he occupied the place of the faithful servant on guard, just as he has occupied every place that he has been put in for twenty-five years in North Carolina. And I say of him to-day, as I said on another occasion, "that the people of North Carolina may lie down and sleep, confident of safety, while he guards the outer gate."

Now let us see. John Henry Boner, a citizen of my town, an officer of the Legislature in 1868-'69, elected Clerk. He alleged that the law said he should have $7.00 a day, and that another statute said that his pay should be $10 a day. (In those days it was worth while to be a member of the General Assembly. They were not the scorned of the people as they are at this day. Why, my friends, Governor Jarvis walked away loaded down with shekels at the close of that session.) This Clerk brought suit for ten dollars a day for three hundred and four days, less seven dollars a day, which he had theretofore received. He claimed that the additional sum was due him by virtue of the act of Assembly, ratified the 26th of November, 1869, entitled "An act in relation to per diem and mileage."

Now, Senators, I want you to hear what the Judge says in this case. Judge Reade uses these words: "The Treasurer can pay no money out of the treasury, except on the warrant of the Auditor." The plaintiff admits that he had no warrant from the Auditor, and so, according to the plaintiff's own showing he could have no process against the Treasurer. Now, this is a case that was tried before Judge Watts, the celebrated Judge of the Superior Court. The Judge gave judgment against the Auditor and Treasurer, and a peremptory writ compelling the Auditor to audit and

the Treasurer to pay. (Here counsel reads the case of *Boner v. Adams.*)

Senators, I asked the Judges of this Court, Judges Douglas and Montgomery, the question, "Has there ever been a case where a peremptory mandamus has issued from the Supreme Court of North Carolina since its existence, for more than one hundred and twenty-five years, to the State Treasurer, requiring him to pay out money?" That was my question, and both of them answered, "There never has." In all the history of this Commonwealth, there never has a peremptory mandamus gone into the hands of a State Treasurer, served upon him as it was in this case, absolutely commanding him, on pain of contempt and imprisonment, to put his hands in the treasury and hand out money. Not since the beginning of this government until now. All this should have put these men to inquiring into this decision that I have just read to you. It was read to the respondents by Judge Clark, examined by them, quoted by them in their opinions, quoted by Judge Clark in his opinion—no question, Senators, about the knowledge—no question—they had considered it in open Court. Judge Reade says, "Treasurer Jenkins could pay no money out of the treasury, except on a warrant of the Auditor. The plaintiff admits that he has no warrant from the Auditor, and so, according to the plaintiff's own showing, he can have no process against the Auditor, therefore, the case was dismissed, as to the Treasurer, with costs." This authority, I am going to show you, has been affirmed from time to time; according to that authority, all that the Court could have done that day would have been to issue its mandamus against the Auditor, and dismiss the suit as to Worth, because he was not at default until after the warrant had been presented to him for payment. The Auditor is an officer under the Constitution, with duties to be prescribed by law (Acts of 1868-'69, Chap. 270). Now, it is exactly

the law in North Carolina, and they will not deny it. I read the exact words: "First, to superintend the fiscal concerns of the State," and in subsection 7, "To examine and liquidate the claims of all persons against the State, in cases where there is sufficient provision of law for the payment thereof; and where there is no sufficient provision, to examine the claim and report the fact, with his opinion thereon, to the General Assembly." That is what he must do. If he examine the claim and so find, the Auditor is the one to send the claim, with his report to the next session of the General Assembly, informing them of the fact that he found the claim due, but there is no provision of law requiring him to pay it. He has power to require any person presenting the account for settlement to be sworn before him, and to answer any question relative to its correctness. It is apparent that the Auditor is not here merely a ministerial officer.

Now, Mr. Osborne, you say that it is true he is not a ministerial officer. I say that he is not that where he has to pass upon the correctness of a claim; it is not a ministerial duty. Supreme Court of North Carolina, Judge Reade speaking, and at the time concurring with him in his opinion, were Judges Pearson, Rodman, Dick and Settle, says this: "If there is not sufficient provision of law, then he has to examine the claim and report the fact with his opinion, to the General Assembly." Precisely. "That is not ministerial." "The plaintiff has a claim against the State for services as Clerk of the General Assembly. He says part of his claim has been paid, and part is still due. The Auditor's first duty was to pass upon its correctness. He has done that, and says it is not correct." And winding up, he says: "It seems to us that the plaintiff's remedy, if he has one, is an application to the Legislature, which, through its appropriate committee, can pass upon the claim, and if just, can make it the duty of the Auditor to pay it. We dismiss the appeal," and the Judges threw the case out of Court, as we sometimes say.

Now, gentlemen, I want to call your attention to the case of *Burton v. Furman.* I want to show you the law. I have just read the opinion delivered by Judge Reade, which has been cited, and affirmed by the Supreme Court, at September Term, 1884. This case was put under the eyes of these Judges, when they were considering that order for mandamus. Now, what does Judge Montgomery say in this case? He says the Auditor refused to draw the warrant upon the Treasurer for the full sum demanded, and thereupon application was made to the Court to compel the Auditor to issue the warrant and the Treasurer to pay it. And it was held that no warrant had issued, and it could not be required of the Treasurer to pay the sum.

Since the decision of the last-named case, the subject has been often considered. Selecting one, the Brown case, we find a very clear statement that the "mandamus will lie when the act required, which is imposed by law, is merely ministerial. But it does not lie where judgment and discretion are to be exercised, nor to control the officer in conducting the general duties of his office." That decision was rendered in 1894, but the respondents knew of it. It was held under their very eyes by Judge Clark. It was rendered by a unanimous Court; it was in confirmation of the doctrine laid down by Judge Bynum in *Brown v. Turner;* it was in confirmation of the doctrine laid down by Judge Rodman in *Shaffer v. Jenkins,* and by Judge Reade in *Boner v. The Auditor.* It is consistent with the authorities in every State in this Union, that no Court can go into the Executive Department of a State Government and undertake to control the official and discretionary actions of the officers of that department. It was never done in North Carolina by the Supreme Court of North Carolina but in two cases, and that was in *Cotton v. Ellis,* before that provision was placed in our Constitution prohibiting any Court from issuing a process in the nature of an execution against a State, and in

the case of *Bailey v. Caldwell,* decided by the Supreme Court of North Carolina, just after the adoption of that Constitution; and in the case of *Brown v. Turner,* Judge Rodman uses these words: "The case of *Cotton v. Ellis* and of *Bailey v. Caldwell* are not in point. They have no bearing upon this question for this reason. We see clearly in reading the opinion in *Cotton v. Ellis* that in that case the Governor of the State consented to the Supreme Court jurisdiction in order to get the Court's opinion as to the validity of Mr. Cotton's claim." And he further says: "That as to the case of *Bailey v. Caldwell,* that case was before this Court, and the Court remembers that those were the facts, that Governor Caldwell went in and submitted to the jurisdiction of the Court to get the opinion as to whether Mr. Bailey as Code Commissioner was entitled to his salary." But it is argued that White's was not a claim against the State, but a claim against a State is for a bushel of potatoes or for a load of wood, like Bledsoe's case. But it does not affect the salary or fees of public officers. Boner claimed fees of a public officer. The Supreme Court says that is a claim against the State. You present it to the Legislature where it belongs. We will not hear you, and we will reverse Judge Watts' decision, and we will refuse your mandamus and dismiss your action. In Turner's case they say the same thing; and the Court goes on and cites a case from Rhode Island, where the Supreme Court of Rhode Island says, "In all the books we have found but one case in which the writ of mandamus has ever been allowed to issue against a Governor of a State, and that is the case of *Cotton v. Ellis.*" Judge Rodman says, that it was evident that the Rhode Island Court had not paid very particular attention to *Cotton v. Ellis,* or it would have discovered that the case was an action by consent of the Governor himself. And now bear in mind, Senators, that while the Governor can assent to the jurisdiction for the State of North Carolina, no one of his subordinates by a case agreed

can do it (I can cite you many cases on this point), for the plain and manifest reason that if a subordinate officer like an Auditor could go in and submit to the jurisdiction of a State Court, the State could be ruined before its chief officer would know what was going on, by binding decisions impoverishing its treasury.

Senators, that there may be no mistake here, and it is of vital importance, I want to show you the language of the learned Judge, reviewing the concluding part of the opinion in *Cotton v. Ellis.* The Court says: "It appears that the Governor did, in that case, consent to the jurisdiction of the Court in order to obtain the opinion of the Court on the merits of the relation. Such, we know, was the case in *Bailey v. Caldwell.* These authorities, however, are not authorities in favor of the jurisdiction of the Court to issue mandamus; and whenever that question shall be presented, the learned opinion of the Supreme Court of Rhode Island refusing such jurisdiction, shall have respectful consideration."

In Shaffer's case there was a special appropriation of five hundred dollars, set apart for the payment of expense of laying out, surveying and building a road; and in that case the plaintiff came before the Governor, and he gave him his warrant. And the Supreme Court said, "We will not go behind the warrant to ascertain whether the work had been done or not. We will take it for granted that it has been done." In that case, they were hired to do it by the State, and money set apart for the purpose of paying it; yet, the Legislature has passed an act forbidding its payment, and, whether constitutional or unconstitutional, we can not go behind that act." That is the effect of the Shaffer case.

Now, Senators, I have read you those authorities. I want to say this: We are not impeaching the Judges for following the case of *Hoke v. Henderson;* no one has ever said that they were impeachable for following the case of *Hoke v. Hen-*

derson. The case of *Hoke v. Henderson* carries in its own opinion, written by the Court, all the precaution to all the Courts that have followed it. It has laid down a rule of construction, and if these Judges had been governed by it we would not have been to-day in the trial of this cause. "Although this function," says Judge Ruffin—that is, the function of declaring a statute unconstitutional—"Although this function be in itself comparatively humble, and does not call for those high attainments required for wise legislation, which, as it affects all the diversified interests of society, ought to embrace a knowledge of all of them, and a just estimate of their relative importance to individual happiness and the common weal; yet, the exercise of it is the gravest duty of a Judge and is always, as it ought to be, the result of the most careful, cautious and anxious deliberation. Nor ought it to be, nor is it ever exercised, unless upon such deliberation the repugnance between the legislative and constitutional enactments be clear to the Court, and susceptible of being clearly understood by all."

You see the wise Judge, you see the great Judge, you see the Judge that was so careful not to overstep the boundary line laid down by the fathers between the judicial and legislative branches of government. He says it must not only be so clear that there is no mistaking it by the Judge, but it must be so clear that the Judge can explain it in such a way as to be understood by all, that is, to prevent clashes between the judicial and the legislative branches of government.

Now, there is a rule laid down by Mr. Enlich, section 182. I can not find the book, but I took the precaution to copy it—of Enlich on the Interpretation of Statutes. It is a book that has been cited here by the counsel for the respondents; it is a book that is cited by the Supreme Court in *White v. The Auditor;* it is recognized authority in the courts of North Carolina, and I want to read to you section 182 of that book on the Interpretation of Statutes, and I say, Senators, that if

this Court had been mindful of this well-established rule of construction, of interpretation; if it had been mindful of the fact of the great first primary rule of all interpretations, that the duty of the Court was to ascertain the intention of the Legislature that passed the statute—that is, the primary rule, the great primary rule in the interpretation of a will is to arrive at the intention of the testator in a deed; to arrive at the intention of the makers of that deed; to arrive at the intention of the grantor and grantee. Now, to arrive at the intention of a statute, or a number of statutes all in one book, or in different books, under the doctrine of *nos citur associis,* the rule is this. It is a rule that would have avoided all this trouble; would have shown that that part of the Statute of 1899 was constitutional; that it was in existence; that it prevented this Court from issuing this writ; that the Court was not advertent to this section in this book here. Here is the rule: "It is not in accordance with settled rules of construction to ascribe to the law-making power an intention to establish conflicting and hostile systems upon the same subject, or to leave in force provisions of law by which the later will of the Legislature may be thwarted or overthrown." I want you to bear this in mind, Senators. "Such a result would render legislation a useless and idle system, and subject the law to reproach. Where two statutes conflict, the earlier is repealed by the latter. Of course subsequent legislation repeals previous instances of legislation, whether it expressly says so or not. In the nature of things it would be so, for contradictions can not stand."

Now, you take that rule of interpretation and apply it to the Statutes of 1899. They are in absolute conflict with the Statutes of 1897, the latter repeals the former, and the Court could not sit there and say that for the sake of keeping this man in office, and giving him his pay, we will restore the Act of 1897, putting that officer who was named in that Act of '97 in, writing his name into the Act of '99, so as to make

him draw that pay. The Act of 1899 is in conflict with the Act of 1897, and whether it repeals it or not in express words, it repeals it by implication.

Now, Senators, that is all the book that I expect to read.

I want to submit this issue to you: Have the respondents for the past two years been rendering decisions that were partisan in their nature and character?

The answer comes from the other side, No, because they rendered the decision they did in *Wood v. Bellamy.* They left Bellamy and his associates in control, and they were Democrats. Now it is well for us to know, and remember and consider the facts surrounding that decision. The Court itself says in that decision that the act was so hastily drawn that the draughtsmen did not even take time to learn the titles of the officers in the institution, or the names of the institutions themselves. They left the act exactly like it was, striking out a name, describing the same office by another name, all of the same act, and when construed together, it meant nothing but to bring it directly within the case of *Hoke v. Henderson,* taking one officer that was called, for instance, a director, and setting him out, and putting in another to perform the same duties, by another name. But in the case of *Wood v. Bellamy,* have these institutions ever been political? Have they ever been considered political? Were they political then? Was Dr. Wood a Republican, or was he not an ardent Democrat? The former Superintendent of that asylum over there had been a Republican just about as far back as I can remember—certainly as far back as I can remember to have been acquainted in the city of Raleigh. The man who held the office of Superintendent of that asylum, Republican as he was, held it through all the Democratic administrations. I believe Governor Jarvis claims credit for having done it all himself, but it seems to me there was much legislation on the subject. They did not turn him out at all. They never turned him out, except finally for malfeasance in office.

They never treated it as a political question, and at the very same time that the Court was hearing argument on this case the people of North Carolina, regardless of politics, were calling upon the authorities not to turn over these people upon whom the hand of affliction of Almighty God had been laid so heavily into the hands of politicians; and at the behest of the whole State, regardless of politics, that decision was rendered, and these people, trained physicians and trained nurses, were kept in this institution; and they were kept as they had been before, and no complaint was made of it. Now, let us go on—let us go on beyond that. I say, Senators, that there is no complaint of this Court, there has been no ground of complaint of this Court, until the great upheaval of 1898. When the great upheaval of 1898 ended, it left the party to which these respondents belong, stranded, helpless, but mad to the bone, Judges and all! That is the truth in all its nakedness. They sat here in the city of Raleigh, and from the time that verdict was rendered, up until the time these articles of impeachment were presented, even up to as late as the 127th volume of the Reports that is not yet out, in the unbound volume you will find the decision, with Justice Clark and Montgomery dissenting, Judge Montgomery saying: "It is plainly controlled by three cases, two of which we have decided to the contrary of the present decision, and therefore I dissent." Up to that moment they had been rendering decisions they say they do not believe were influenced by partisan considerations; they say they do not believe that they were controlled by political motives (but no man believes that) while engaged in it. All you have got to do is to follow them—you follow their decisions since 1898, and you will see whether there is any change or turning on their part. You follow them. We find that since '88 they have taken from the Democrats the control of the Atlantic and North Carolina Railroad in the case of *Patrick v. Bryan,* where they gave

that railroad over to their partisans, Judge Clark delivering an able dissenting opinion. Governor Jarvis said on yesterday, "Why don't you impeach Judge Montgomery, for he has never delivered but one dissenting opinion." If you examine the cases, you will find in *Bryan v. Patrick* that Judge Montgomery delivered an able dissenting opinion, showing successfully that a majority of the Court were moved by partisan considerations. The only railroad that is now under the control of the State of North Carolina was retained and held by Republicans under that decision.

Let us take the Western District Criminal Court. I am informed that Mr. Osborne's deft fingers held the pen that wrote the bill that organized that Western Criminal Statute. He wrote it; he supported it in the Senate; he helped to enact it into law under oath. He says he knows the law; he says this Senate does not call upon him to bring books when he asserts what the law is. By the time they had gotten through with his bill, its author would not have known it he had met it in the road. Before any Senator votes to acquit these Judges, whether he be lawyer or layman, I would be glad if he would read the case of *Wilson v. Jordan.* I suppose there is hardly a lawyer in the State of North Carolina that has read the case of *Wilson v. Jordan,* that did not break into a laugh when he read it. (124 N. C.) They crowd in so thick in the 124th, 125th, 126th and 127th Reports, that I can not tell just how many there are. Judge Furches gave them to me the other day; there are eighteen, twenty or more. They came in so fast that Judge Montgomery says it took a large portion of the Court's time in the decision of these political cases. He gives you a picture of what was going on over there at that Supreme Court room, that looks to me when it goes into the books as evidence in this case, that the picture he gives of this Court, to this Senate, sitting as a high Court of Impeachment, will not be a proud page for North Carolinians who will read it

twenty-five or fifty years hence, as to what was passing in the consultation room in the highest Court of this great Commonwealth.

They undertook to take charge of the Penitentiary. Mr. Osborne says he was present, and that there was no politics, and that the only reason the Legislature had (he was not turning State's evidence then), the only reason in the world that the Legislature had in passing that act was that it was afraid to trust Capt. Day because he was a lawyer, but he says it turned out that his management of the Penitentiary was perfectly magnificent. Mr. Jarvis says that grew out of the copartnership that came about between Day and your appointees. They worked together; he consulted with them, and made them his assistants. But Mr. Osborne justifies the Senate that he has covered with reproach and the House of Representatives that has received his condemnation to-day. He justifies them by saying that what they did by putting these men in there to operate that Penitentiary, that by operating it jointly with Mr. Day they had taken an institution and made it self-sustaining that had run the State of North Carolina in debt one hundred and ten thousand dollars under the control of the men that were sustained by these respondents. And then you ask me to give a good reason why that Legislature of 1899 should have interfered in the management of that Penitentiary.

They passed an act to create the Western Criminal Circuit. We needed it in those counties; it was working admirably in the county of Forsyth, enabling us to try our civil docket. The case of *Mott v. The Commissioners of Forsyth County* came to Raleigh and was argued before the Court, and the Court put the knife into that bill so deep that it not only destroyed the Western Criminal Circuit, but it destroyed the Eastern Criminal Circuit and made necessary their abolition, and made necessary the appointment of four Superior Court Judges that we would not have needed

but for the decision of *Mott v. The Commissioners.* Judge Clark filed a strong dissenting opinion, and Judge Montgomery a strong dissenting opinion, but they did it. Judge Montgomery says, under the Constitution, as amended in 1875, "It was within the power of the Legislature to apportion the criminal jurisdiction in any way it saw proper." Judge Montgomery said so, Judge Clark said so. Three of the Judges said, No; we take care of this officer. He is deprived of some of his fees by putting Forsyth County in a criminal circuit. That is not all. We had a school law in North Carolina. Now, there has been a great deal of talk before you, Senators, about men having property in the salaries and fees that are incident to their office; that they are properties that you must not deprive men of. There was a great school system inaugurated in North Carolina by that able General Assembly of 1899, of which my friend was a member, with school boards in every county. Were they paid officers? Did they have great interest in the pay that attached to these offices? The old boards had nothing in the world but the influence in organizing schools and appointing school teachers. But they were partisan, and they said we will not yield. The Superintendent of Public Instruction, although not a Democrat, said, "Get out, and let the new ones come in. I want to run my schools; I want these new men that the Legislature of 1899 has put in here; I want them to take charge of the schools." They replied, "We shall not do any such thing." And they brought their suits, one after another, and kept crowding them into this Court; I can not tell how many did come into the Supreme Court. Each one of them was decided in favor of the old hold-overs, not for the sake of the pay of his office, for he had no pay, but for the sake of the political control. The last one they decided, his term of office expired before he could get it heard in the Supreme Court, and then they reversed three recent decisions of the Court in order to keep him from

paying costs, Judge Montgomery and Judge Clark filing dissenting opinions.

Senators, after they had taken charge of the Penitentiary, after they had torn to pieces the criminal circuits and rendered them of no use, by judicial construction and interpretation; after they had, by judicial interpretation, held on to the Atlantic and North Carolina Railroad; after they had, by judicial interpretation, kept the old crowd in charge of the schools all over North Carolina, then there came a question as to whether or not Mr. White should still control the Steamer "Lillie," and should still control the Shell-Fish Industry of Eastern North Carolina.

Mr. Pou has discussed that. I wish before any man on this floor makes up his mind to vote "Not guilty" on the 5th article, on the article that charges partisanship, I wish he would take the Statutes of 1897 in regard to the Fish Commission in Eastern North Carolina, and read the Statutes of 1899, comparing them together, and then take the decision of the Supreme Court in *White v. The Auditor* and *White v. Hill,* and see whether it is possible for that decision to have been made by that Supreme Court unless its hand has been guided by partisan motives.

I say to you, and it was admitted by Governor Jarvis on yesterday, that if they rendered a decision of the Supreme Court that was guided and influenced by a purpose to aid a political friend, or at the instance of political friends, or with a view to carry out political ends and purposes, that that of itself is an impeachable offence, and it is time the Judges in this State, and all over the United States, should learn that. It is time they were taught that.

Now, have they been delivering political opinions? Let us ask my distinguished friend, Colonel Osborne, what he thinks about it. I want to "appeal from Philip drunk to Philip sober." I want to say to Colonel Osborne, after all he has done here to-day, arguing, and almost getting up and

thanking these Judges for undoing your work in the Legislature of 1899, almost ready to get up and say to them that you need a switching, asking them to give it to you in the humble position that you occupy, saying to them, the great lawyer that you are, having occupied a great position that you have at the head of the Law Department of the State for years, that you drew with your own fingers, and your associates, as good lawyers as you, and you, as a member of the Judiciary Committee, passed upon every bill drawn, under the light of *Wood v. Bellamy,* under the light of *Ward v. Elizabeth City,* guided by those two decisions, showing you what was the doctrine in *Hoke v. Henderson,* you passed those bills in that House and voted for them, under the obligation of your oath to support the Constitution of North Carolina. I want you to stand here to-day, and I want the Senate to see you, and I want you to say that you did it with the expectation that these good men would pronounce them unconstitutional.

Mr. OSBORNE: I tell you, as far as my voting for these bills is concerned, I did it because I wanted to put my Democratic friends in office. And then I was doubtful about their constitutionality, and I wanted the Court to pass upon that question, like everybody else. We were all debating this question among ourselves, being doubtful about the constitutionality. There was but one place to settle it, and that was the Supreme Court.

Mr. WATSON: I was once a member of this body. Some of you are old members; some of you were members of that body of 1899. I reckon you have heard the argument of the lawyers discussing this question as to whether these acts were unconstitutional or not, whether they were not drawn under the law in *Wood v. Bellamy,* and in *Ward v. Elizabeth City,* carefully drawn following these cases, so as not to come in conflict with *Hoke v. Henderson.* Now, I will hear from the Senator's acts, after the adjournment of the Legis-

lature of 1899, I will let his acts testify for him. When the Legislature of 1899 got through its work in the early part of March, they were ready to adjourn and go to their homes as was usual; having served out their sixty days, passed the necessary legislation, they were ready to go. What did we see them doing? We saw them adjourn to meet on the 12th day of June, 1900. Why did they meet on the 12th day of June, 1900? Why did they adjourn to meet on the 12th day of June? They came back on the 12th day of June, 1900, and they found this same Supreme Court still in session, the longest session, I guess, that they ever held in the world; the people all over the State of North Carolina wondering why it was that the Supreme Court was holding its session until after June. And they remained in session, Senators, until that Legislature had passed an act preventing them using, what sort of writ? Taking away from this very Court the right to issue an injunction or mandamus returnable before them out of term and stopping the great election into which the people of North Carolina were putting so much heart. That is what you went there for, and you found them in session, and you passed an act, and the Court adjourned and went home the next day.

But you did not know what else was going to come at that time. All these political decisions had been made. This Court had made its record, and you knew what to depend on; and when you had even, as you thought, tied their hands behind them so that they could not interfere with the free people of North Carolina, with the free election, you were still afraid on account of a meeting that you heard of up at Greensboro between the Senator and the Internal Revenue officers and Congressmen Pearson and Linney—you were still afraid of the Court, so you adjourned to another day just before the election, so as not to give them time to interfere. Who were you standing guard over? I appeal from the counsel for the respondents to the honorable Senator,

who was standing guard over the women and children of North Carolina, to protect them against the writs to be issued by the Courts of North Carolina at this present time? Did he know them then? Did that Legislature know them? They thought they did. The whole State of North Carolina thought they did; and no man complained of that Legislature's adjourning from time to time to watch the Court. Did they know them? I take it they did, because the honorable counsel stood up here yesterday and said instead of impeaching these respondents, the thing for this General Assembly to do, composed as it is of the good men of the State, was to acquit these respondents, wait for the House to come back on the 3d of April next, and then proceed to pass acts taking away from them the right of jurisdiction over the Constitutional Amendment. And yet, Governor Jarvis tells you, Senators, that he knows these people, and that there is no danger in them; and he stands up here and vouches for their conduct after a verdict of acquittal. Let us have a bond! It is not the first time that men have stood up in legislative bodies and stood security that men would obey legislative enactments, and not carry them to the Courts. I am told that the promise was made in regard to the Penitentiary to the Legislature of 1899, but it could not fulfill the promise. I am told that the promise was made to the Legislature of 1899, that if there was no tax upon gross receipts of railroads that the railroads would submit to taxation, and would not fly to the safe cover of a Federal injunction; but it was not carried out. Senators, the Legislature adjourned; the injunction issued from the Federal Court, and the writ of *quo warranto* was tried in the Supreme Court as to who was boss of the Penitentiary.

Senators, is it possible that I have got to stand up here and argue longer to you on the great question that is presented in the 5th article, as to whether these defendants were not known to have been wielded by politicians from

the election of 1898 until the present time, until these articles of impeachment were formed? Mad? Of course they were mad. They were mad at North Carolina; they were mad at this great race in North Carolina that has been so valiant in all past times through all its generations. It was the race that struck at tyranny on the banks of Alamance Creek long before the Mecklenburg Declaration. It is the same race that made Mecklenburg County and her sons immortal in the great Declaration of Rights in 1775. It is the great race of men that fought at Guilford Court House and Kings Mountain. It is the race of men that stood as a wall of steel when Cornwallis invaded its territory. It is the race of men that camped along his track and drove him to the sea, finally resulting in his capitulation at Yorktown. It is a race of men that have never been quick; they have always waited until the proper time, but when that time came, it is a race of men that have acted, and acted with terrible effect. Nor is that all—it is a race of men that heard in 1861 that invaders were approaching their land from the North, coming down into Virginia, coming over in the direction of the territory of North Carolina—this old State, all her men, almost from boyhood to old age, went out to meet the invaders, and they left more dead men in the track of the invader than any two States; they left more men, they brought away from the field more men torn and bleeding and mangled than any two States in the South. They were the men that rendered immortal the name of North Carolina on every battlefield in Virginia. They are the men that have made the record of North Carolinians safe in the hands of historians now and for all time hereafter. It is the same race of men that roused up in 1870, overthrew the Holden administration, and brought the offender to the bar of justice under a charge made in articles of impeachment; turned him out of office, disqualified him forever, and set an example to the executive branch of

this State Government that will last for a hundred years to come. That is the race of men that went along in peace and in prosperity, from 1870 to 1894. During 1894, 1895, 1896 and 1897, this Anglo-Saxon king slept in his native forest; but in 1898, aroused by the cries, the plaintive cries of queen and cub, that lion rose, shook out his mane, and with a roar that sounded from old ocean to mountain top went to the rescue. Everywhere these people came to the front and overthrew corruption in high places and turned the unworthy out of place. It is the same race of people that have sent this House of Representatives to represent them here. It is the same race of people that is behind these articles of impeachment to-day; and as often as you read it, and as often as you hear it, that that race of people are not behind this prosecution, just so often you suffer yourself to be deceived, for it is not true, and can not be true, and never will be true.

Mr. President and Senators, you have listened so long to counsel, you have been so kind and generous, that I hardly know how to ask you not to force me to complete to-night; but at the same time I came in here this afternoon expecting Mr. Osborne to consume a considerable portion of the afternoon, but he did not take so long as I expected. I have been working just as hard for the past two days while sitting here watching and listening to the arguments of Governor Jarvis and of Mr. Osborne as if I had been myself actually engaged in talking to you. And when I arose to address you this afternoon, I felt so tired and oppressed that I hardly felt like I was able to stand up and talk to you at all.

At this point, on motion of Senator WARD, Court adjourned until to-morrow at 10 o'clock.

SEVENTEENTH DAY.

SENATE CHAMBER,

Thursday Morning, March 28, 1901.

The Senate met pursuant to adjournment at 10 o'clock.

The roll was called and the following Senators responded to their names:

Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, Jones, Justice, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

Mr. WATSON, resuming his speech of yesterday afternoon, said:

MR. PRESIDENT AND SENATORS:—It is a pleasure to me, Senators, to know and feel that we are so near the end of these deliberations, and that you will be permitted to go to your homes, and that I will be permitted to go to mine to leave this city, not that it is not a pleasant place for all of us, because the whole State of North Carolina and the people of the whole State love the generous people of her capital city. But I long to go home; I long to get back to my own country and look upon its swelling hills again, and I hasten to the conclusion of my part in this great trial. It has just been suggested to me that possibly while standing here in my feebleness, and fighting for what seems to me to be for the best interests of the whole people of the State of North Carolina, I am under the shadow of two great corporations. I trust it may not be so, and if I knew it were so, I would

feel like suspending for a moment and reverently invoking the Spirit of Almighty God, to be present during these deliberations.

I spoke yesterday, Senators, of the great sacrifices that the people of this State made in repelling on one occasion an invasion. I stand before one branch of this Assembly and say to you that it is again time for you to resist encroachments, to repel an invasion of your rights under the Constitution of this Commonwealth. You are a great department in the government of North Carolina; you are the department upon which the people have placed the burden of government. The duty of providing the whole machinery of the government in North Carolina is upon your shoulders as a co-ordinate branch. You have to look after her institutions, educational, charitable and penal; you have to look after the education of the people of this State; it is upon you to do that. You are called together once every two years to perform this great work, and I have sat for years and looked upon the men, true men, coming to this city from all parts of North Carolina, working from early dawn to the hour of midnight in session and in committee, trying faithfully to perform the duty the law has placed upon them. And I have seen a growing tendency upon the part of a portion of the press of North Carolina, and upon the part of a portion of its people, to degrade and lower the estimate of the people as to this branch of government. I have seen true and faithful men work until hardly able to sleep at night, looking after the great interests of this people, and I have seen them scoffed at and called a mob. It has gone to such an extent that the members of the co-ordinate branch of the government are beginning to be looked upon with contempt and contumely by a part of the people of this great State when they biennially assemble to perform their duties. It is time for the legislative branch of this government to assert its rights, to move forward and take the position that the fathers

of the republic designed it should take as a great branch of the State government, by far the greatest branch.

I am going to rapidly answer some of the questions presented to you yesterday and the day before, which I have overlooked.

You were asked the question whether Democratic Judges would have been impeached? My answer is, that it has been the history of all impeachments in the United States that they have followed political revolutions, and that they are always, and have always been, in a character political, because men of one political party do not impeach officers belonging to the same party; they never have done it, and they never will do it. The men who framed the Constitution knew they would not do it, therefore they provided that the legislative branch of the government should have the power of impeachment, and they further provided that election to that legislative branch should be frequent, so that action upon impeachments might be speedily taken after the offence was committed.

Now, answering the questions as I see them here: I am reminded that there was much talk indulged in by counsel for the respondents as to the question of the burden of proof in this case, urging the plea we so often hear in the courthouse that we must prove the parties guilty beyond a reasonable doubt. Where is the burden of proof? Take the case of a man indicted for assault with a deadly weapon: after it is proved upon him, the burden shifts and he is guilty, unless he proves he was justified or excused in its use. If these Judges have not followed the law, and there is not a man in the sound of my voice who believes they have; if the act as admitted on the part of the respondents be unlawful, it is for them to show that they were justified in it, or did it innocently. On them was the burden, and there is where the question of reasonable doubt is removed from your minds. The moment you find them guilty of the overt act, it is no

longer a question of reasonable doubt upon us as holding the affirmative. Mr. Osborne asked the question yesterday, Senators, "Suppose I had been a Judge and had done as they did, would you have impeached me?" My answer is, No; they never would have impeached you, but if you had come here and done as they did, we would have made application to Dr. Murphy for you, at Morganton.

It was said yesterday that your own faithful Treasurer, the noble-hearted Ben Lacy, has paid some of these White claims since he went into office, and that therefore the Judges are not guilty. Why, when Ben Lacy went in the office already a writ of peremptory mandamus had fastened upon it, ordering the payment of these claims, and had he not paid them another writ would have issued against him from the same Court. The consequence was he paid them until the General Assembly by its action said to him and to the people of North Carolina we are going to reverse the decision of *White v. Auditor.*

Now, Senators, I come to my last proposition; I come to discuss the question arising under the decision of *White v. Auditor.* I say that this Court, and the majority of this Court, including the respondents, decided the case of *White v. Hill* by overthrowing and destroying the expressed will of the General Assembly. The Supreme Court has found that the General Assembly of 1899 did not intend to deprive White of that office; that it did not intend to reorganize that department of the State's business; that they did not mean what they said, when they said we will discharge this man White, who is in charge of this business extending over half a dozen counties, appointing irresponsible deputies for each county without oath or bond, by abolishing his office; that in their stead we are going to divide it up, and put one man in each county to look after the business in his particular county, and put him under both oath and bond; the Supreme Court has said that the General Assembly did not mean

that. It has resorted to an old doctrine we call *"in pari materia,"* a rule used in the construction of statutes, under which there have been a thousand encroachments upon the legislative will by the judiciary, both National and State. They invoked that, and said they were arriving at the legislative will, by construing a number of statutes together. I read to you a well-established rule in regard to that on yesterday. I read from Judge Ruffin on that, that it is a dangerous thing to do, and I say to you that when you put a Judge to construing different parts of statutes passed upon different days, and in different years, then you give him the power to overthrow the legislative will in all cases, if he sees proper to do so. If this Senate believes that the Legislature of 1899 did not intend by its act to reorganize that department of shell-fish in the waters of Eastern North Carolina, if you find they did not intend to displace White, to enlarge the scope of the business and make it better for North Carolina by putting in different men, with different duties and responsibilities, you can return a verdict of "Not guilty." If you believe a proper construction was placed upon the statutes you can do that. If you believe that the General Assembly, when it said that no part of this fund should be paid to other persons than those named in the provisions of the Act of 1899, if you believe they meant, when they passed that statute, to say that it is our purpose to pay Mr. White not the salary of $900, but $400, that ends this prosecution.

But there is not a man in the sound of my voice who believes that the Legislature intended any such thing; no man can take those statutes and twist them into any such meaning. It is impossible for the human mind to arrive at that conclusion, unless moved by outside influences.

Did the Legislature intend for White to be paid? There are men in the sound of my voice sitting as members who helped to pass that act. Did you intend that he should be paid? Did you intend to give four hundred dollars to White

and nothing to Hill and his associates? If you did, then there is nothing in this prosecution. If you did not, if you intended to withdraw that fund from the payment of White's claim, and transfer it over to the payment of Hill and his associates, then this Supreme Court issued a peremptory writ of mandamus without authority of law, because there was no appropriation, and it is admitted everywhere that if there is no appropriation of this fund to White, it was a violation of law to compel the Auditor to audit White's claim and the Treasurer to pay it. If there is a man within the sound of my voice that can put his hand on his heart, and under the oath he has taken say that the General Assembly appropriated this money to White's claim, let him do it in the presence of the people of North Carolina. Let him say it. If it was not appropriated to White, no Court had the right to say that White should have it against the will of the General Assembly, even though that expressed will of the General Assembly was unconstitutional. The highest court in this State has said it; the highest court in the United States has said it over and over again that although a special fund may have been set apart in the hands of the public Treasurer for a specific purpose, if a subsequent Legislature, by act or resolution, withdraws that fund and makes a different appropriation of it, then whether the act be constitutional or unconstitutional, no court can go behind the act and force the Treasurer to pay the claim. I state that they did not intend the appropriation for White; that they never intended he should have a dollar of that money. Am I justified in saying so? The ex-Attorney-General who addressed you said they did not so intend it. The able counsel who first addressed you for the respondents in this case was so absolutely sure that there was no such purpose on the part of the Legislature of 1899, that in the great argument he delivered to these listening Senators, he used these words: "The Court having decided in *White v. Hill* that White was

legally in possession, he was as much entitled to the salary as to the office, and could no more be deprived of the former than of the latter; the Court had jurisdiction to make the judgment effective, as otherwise the judgment would have been of no effect and the officer without remedy; for it is reasonably certain that if he had applied for relief under Art. IV, sec. 9, providing that he shall present his claim to the Supreme Court, and the Supreme Court only recommend to the next General Assembly for the payment of his salary, no recommendation of the Supreme Court for the payment of his salary would have been heeded by the Legislature which had attempted to deprive him of his office."

It was carried home so strong to the legal mind of my friend, Judge Bynum, that he had to stand up before this Senate and say, "It is reasonably certain that the Legislature of 1899 did not intend to leave that appropriation for the benefit of White." I will come to that again presently. I will approach it from a different gateway. When *White v. Hill* was decided, the opinion delivered in that case shocked every intelligent lawyer in the State of North Carolina—every one. There is no authority for it. Judge Clark in a most able dissenting opinion, pointed out to the Court that the decision of *White v. Hill,* under the pretence that they were following the old case of *Hoke v. Henderson,* was not law, and cited authority after authority, and cited the great Chief Justice himself to show that it was not the law; but they did it. That decision was handed down at the Fall Term, 1899; the Legislature was to meet early in June, 1900. A suit was brought; what kind of suit? As I stated before, gentlemen, this same Supreme Court, time after time, has warned the profession not to make up cases agreed against State officers in charge of public funds, against county officers in charge of county funds, in counties other than where the officer lives and executes his bond. There is a reason for that provision; when the Treasurer of my

county is sued, let him be sued in the county of Forsyth, that the people who pay the taxes may hear the trial and know whether he is making an honest defence to a claim against the county. There is a powerful reason that a suit against the State shall be brought in the county of Wake. Here is the Treasurer and across the way is the Attorney-General; if the Treasurer is sued he can step across and consult with the Attorney-General; within a few steps more is the Governor of the State, the head of the Executive Department; if a suit is brought against the State here, the Governor knows it, all of the officers of the State know it, the newspaper men know it, and they can stand by and see if an honest defence is made, or whether it is all a sham.

In this case you find that White comes up here from the county of Perquimans; he employs counsel here, Mr. Harris, and you find the Auditor and the Treasurer employing Mr. Busbee. You find Harris and Busbee sitting down, in the absence of their clients, and writing out a statement of the facts agreed. What are they? That under the decision of *White v. Auditor* it is stated and made a part of the case that White is entitled to the office; that there are moneys in the treasury arising out of the oyster fund sufficient to pay the debt or the claim. Does he agree that there has been an appropriation made by the Legislature to cover that and make it applicable to the debt? No; the Auditor and the Treasurer say we are withholding from White this fund because the Legislature of 1899, by chapter 21, expressly withdrew that appropriation. Senators, there came the great question. There are the facts agreed. Judge Starbuck passed upon them, without the benefit of counsel. The counsel between themselves agreed they would only ask the question whether the salary was $900 or $400. That is the kind of case they had against your public Treasurer. They put the papers in the hands of Starbuck and he turned to *White v. Hill* and said, "You are entitled to it." But they wanted the Su-

preme Court to pass upon the question, because the Treasurer knew the men on his bond would be responsible if he did not have the highest Court in the land at his back. What did they swear to? They swore that it is a *bona fide* action; no oath as to the facts on the 30th of November; they then hurry the papers to Judge Starbuck, somewhere in the universe, and in four days they were back here. They were not sent to Perquimans Court, because there was no Court there, and not a scratch of the pen on its docket in regard to this case at that time. They are then sent to the Clerk of Perquimans Court with a case made up for the Supreme Court, with instructions to hurry them back to the Supreme Court. And on the 8th day of December we find the case appearing on the docket of the Supreme Court, and we find the Clerk of that Court, Senators, marking, as a matter of course, the name of the Attorney-General as counsel for the Auditor and Treasurer, because the laws say he shall do so. Directly, in come counsel and move the Court to advance the case for a speedy hearing. They were anxious to get rid of the money before the Legislature met.

They were anxious to have this claim paid before the Legislature of 1900 met. They took the case and moved to have it advanced; they walked in there and made a sham fight—a fight that did not amount to anything. They did not argue the case even. The Attorney-General's name is erased from the docket. There was so little said calling attention to the case, Senators, that when Court adjourned and it went into conference one of the Judges said the only question presented was the amount of the salary. Judge Clark then said if you will turn to the record, which has not been argued, you will find that there is a denial upon the part of these defendants that there is an appropriation made by the General Assembly to pay the claim, and we are confronted with the most important question which has been presented since I have been on the bench. It is not a little case you have.

They threw the papers down then and took an *advasari* without further discussion. Through January, February, March and April the Court struggled over the great question, and when it finally became public Judge Clark had filed a dissenting opinion, an opinion that should be printed and spread broadcast over North Carolina. It is an honor to Judge Clark, and it ought to be published and sent broadcast; it shows beyond question that to let a mandamus issue against the State Treasurer is a violation of the Constitution of North Carolina. We do not know what passed between them; but we know this much, that they got so hot while the discussion was going on, and before it ended, that Judge Montgomery cried out, "I hope no more of these political cases will come before us." He says we spent most of the time for two years discussing them in Court and in conference. It resulted in getting up so much feeling between the Judges that papers were thrown across the table from one to another. It got so warm before it ended that Judge Montgomery said to his associates, "You can order the writ if you like, because you have political parties behind you, but I have not, and have got to stand by the Constitution, and I say to you,Colonel Kenan,there is no constitutional authority for you to issue the writ." That is what he said. As, Senators, with these facts before you, that I am going now to recount to you, where can you find a loophole of escape for these respondents? They filed the opinion on the 22d of May, 1900; the Legislature had adjourned and gone home. They were to return on the 12th day of June. They returned, finding one-half of their legislation absolutely destroyed and set aside and rendered invalid by the acts and decrees of the Court, and a divided Court at that. The Court was almost standing at arms length in lines of battle among themselves. What did they do? They rendered that decision. The judgment was, that the judgment of Judge Starbuck was modified and affirmed without a single refer-

ence to a writ of mandamus issuing. Judge Dillard, one of the greatest men the State has ever produced, my friend and associate in war and in peace, in an opinion, while on the Supreme bench, held that an ordinary judgment for a mandamus always meant for an alternative mandamus to issue, that is, to pay or show cause, and a peremptory mandamus in the first instance never. The Auditor had to pass upon the claim to learn what was due; he had to make up the account and pass upon it, taking the oath of White, if he thought it necessary, as to the mileage and the extra expenses. That judgment only limited the amount of the claim to six thousand dollars. It states "not exceeding six thousand dollars." They say upon that, that Colonel Kenan, an excellent man and ex-Attorney-General, should draw and send out that peremptory mandamus against the Treasurer. They read to you the decision of Judge Clark, in *Caldwell v. Wilson,* but he did not dodge in the case of *Caldwell v. Wilson.* When it came for the writ to issue to the Marshal of the Court to put Wilson out and Caldwell in, he sat right down and wrote the order and judgment that the writ issue at once to remove one from the office and put the other in. That is the way a court acts when "conscience has not made a coward of it." That judgment in *White v. Auditor* was filed on the 21st day of May; the Legislature met on the 12th of June. Mr. Logan Harris represented White, his client; he was anxious to get the money. The speed with which he made up the case and advanced it shows that White was hungering and thirsting for his money, and so was his counsel. The Legislature had adjourned; it was to meet in June and he kept as silent as the grave; it adjourned from June to the last of July, and he still kept silent. Does any man in this Senate have any doubt as to why this delay? On the 12th of June, as soon as the Legislature met, it passed a resolution sending a committee to the Treasurer, not asking him simply if he had paid the money to White, but asking

him to answer the General Assembly, whether he had paid out anything on White's claim, and if so, upon what authority of law he paid it. That was the resolution. That was the resolution that went into the ears of that Court. It was held up before their eyes by Judge Clark and their attention called to it. They not only did that, but they took hold of that fund, mark you, took hold of that fund on the same day when he reported he had not paid it out to White. That Legislature passed a resolution paying that very fund over to Hill and his associates upon their proper vouchers filed, not for work, as Governor Jarvis argued to you that White had performed, but for services they themselves had performed, having gone into the office under the provisions of the Act of 1899 and performed the duties of that office. That Legislature took control over that fund that the counsel claimed was appropriated to the payment of White's claim and actually took it and paid it out to Hill and his associates. Senators, can you say upon your oaths, upon your high duties, can you say that after that there was an appropriation for the payment of White's claim out of this fund? If you can, say it, and say it loud enough for the people of North Carolina to hear you, that no money has been taken improperly out of the treasury. This counsel, Harris, waits until the Supreme Court meets after the great election of 1900, and, Senators, when the Court meets he moves in with his motion for the writ of mandamus. You will remember in reading the answer of these respondents that they say that they did nothing as a court after the filing of the judgment on May 22, 1900, and the effort was made here, strenuously made, to make it appear that the Court, during its session the latter part of September, did not order Colonel Kenan to issue the writ. They deny that they ordered him to do it. They have undertaken to cross-examine Colonel Kenan to show that they did not order the issuance of the writ. They knew the danger point. What does Harris tell

you? When Harris came in as counsel for White he moved for the writ of mandamus from Colonel Kenan. Judge Furches said, "Have you given notice to the other side?" He says, "No, sir, I have not; I did not think it necessary." Judge Furches then said, "Then, we can not hear your motion, unless you give notice to the other side." What motion, Senators? A motion for the writ of mandamus. Harris then left. He did not hunt up Mr. Busbee, who had appeared on the other side, and who made fun of my friend, Major Guthrie, because he had appeared in a case in the Supreme Court, brought to get money for "Old Hoolaboom" out of the treasury. That was no sham fight.

When he was standing out against Hoolaboom, he was standing with a bludgeon in his hands, and the result was that the plaintiff and his crowd turned their backs and left the treasury doors locked. What was the next thing Mr. Harris did? He sent a telegram to Mr. Cook, and he came up and took a seat in the Supreme Court room while the Court was in session. Mr. Harris arose, announced his presence, as counsel for defendants, and did all the talking. So far as any part Mr. Cook took in the trial, Mr. Harris might just as well have brought in a pumpkin and placed it in a chair while he was making his motion. Harris said, "Counsel for the defendants is in the Court." He then asked the Court to take jurisdiction and order the writ. Mr. Cook sat still. But the Judges were thinking of what was ahead of them. They said, "Mr. Harris, have you got your affidavit upon which you base your motion?" "No, sir; no affidavit. I did not think I would need one." He told you he had reasons for not filing one. Then said the Court, "We can not hear your motion without the affidavit." Mr. Harris then left and sought another forum. He appears in an interview in a town paper; he calls the Court to account for dodging, and says he will make them come up to the scratch. We then see him going to Colonel Kenan again. Colonel Ke-

nan had taken counsel of some one, although an able lawyer himself. He knew he was in danger and he went to his Court that had control over him and said, "Gentlemen, here you are in session; I take orders from you, and I want to obey them." "What are they?" One Judge says, "I have an opinion as an individual" (as a citizen of my township, I suppose he meant), "I have the opinion you ought to issue the writ." Another one says nothing. Another says, "I think you ought to issue the writ;" two say do not issue it. He then goes out without much comfort, but he has made up his mind he will have them between him and prosecution, and refuses to act. The next day he comes back. In the meantime he has gone to the Yarboro House and interviewed three of the Judges in their rooms in the Yarboro and talked with them. He will not act on what they say there. A number of things are going on; the Governor himself is talked to while swinging down the street in the presence of Father Worth; he is talked to, and an attack is made upon one of the Judges for what was said in the presence of the Governor. In the meantime one of the Judges (Judge Douglas) meets Mr. Harris while passing through the grounds,and says to him,"You will get your money."But Colonel Kenan has made up his mind that if he gets his money by writ it will be ordered by the Court that the writ shall issue. He then goes back a third time and appeals to the Court. Judge Furches says issue the writ; in the meantime, one of the respondents, Judge Douglas, has found out it is such a serious question that he can not deliver instructions orally to the Clerk, and he goes down and prepares a Yarboro House opinion and reads that to Colonel Kenan at the Yarboro House at night and files it away among his private archives to be used before the Senate when the day of reckoning came. He has committed it to memory, and when Colonel Kenan goes in the last time and appeals to the Court he repeats it to him. Judge Clark said, "You have heard

what I have said, and know my opinion about it." Judge Montgomery says—and by the way, as brave a man as ever lived is Walter Montgomery, and although a man of high temper, he is an honest man. He will not hurt North Carolina if he knows it. I will say that for him to-day. They speak about our impeaching Montgomery. No, never! He is no danger to the State; I do not believe he is. There is no necessity of removing him, and he refused to violate the Constitution. He says to the Clerk, "I say to you, Colonel Kenan, that there is no warrant in the Constitution for you to issue the writ, and I tell you not to do it." Finally, the Chief Justice says, "I tell you to do it." Then, turning to the Clerk, Judge Montgomery said, "That settles it," and the Clerk went out with the order to issue the writ from three Judges. He issued it; it was served, and it took money out of the State Treasury to pay a man named White funds which had already been paid to Hill and his associates for the services they performed, and not performed by White, and in the meantime the Legislature had paid out the money to Hill and his associates for the work they performed. The Supreme Court says, notwithstanding you have paid the money to them, notwithstanding they have done the work, we are going to make the Treasurer pay it over again. There is not a man in the sound of my voice but knows this is true. Now, Senators, I want you, when you come to cast your ballots on the first article, to ask yourselves, Did these respondents follow the law? I want you to ask yourselves, regardless of what your political associations may have been, if they did not issue the writ when they knew the money had been paid to another? I ask you if they did not issue the writ when they knew there was no appropriation to pay it? And if they did not issue it in a moment of anger? I ask you if they did not issue it as a result of a quarrel between them, and in blind partisanship, refusing to yield to the General Assembly, whose acts they had declared unconstitutional,

refusing to yield to the General Assembly when it had made up its mind that it would not be trampled upon any longer, but that it would turn and assert its manhood? Didn't they say, We will try our strength with you at all hazards, and appropriation or no appropriation, we will carry out the decree rendered in *White v. Auditor* by a writ so strong that no officer would dare for a moment to withhold compliance with it after it is served? I insist that you answer us, because your answer will be read to the people of North Carolina from the ocean to the mountains; they will hear your answer. They know the proofs and they will know the law. Was that an impeachable offence? Is it possible that this Senate, in the light of all the authority, is going to say we will not return a verdict of guilty because they do not violate a known provision of the criminal law that came to us with the common law from England? If that were the rule a shrewd Judge could violate every principle of the Constitution; he could interpret it out of existence, and yet violate no positive law which would subject him to indictment. That is not the law. That is admitted by the counsel for the respondents not to be the law. A Judge is impeachable when, after having blinded his eyes by partisanship, he decides a case as a partisan, which he ought not to do, and which is contrary to his oath of office.

Senators, the last point on which I have to speak to you before leaving this question to your consciences—the last view I have to present is in reply to what the able counsel, the ex-Attorney-General, said to you on yesterday. He says: "Yes, I know the members of that Court; I know my clients." He is a great lawyer, my brother Osborne is. He recognized the awful responsibility which rested upon him yesterday as he addressed you, and asked you to acquit the respondents. He says, "I know the members of the Court." He said that in 1898, "I and my associates of the General Assembly found it proper to come here in June in order to

protect the people of this State in the matter of an election that was as dear to them as life. We saw it was absolutely necessary for us to come and stand guard over that election law, and over the officers of the election." Stand guard against the attacks of whom? From the attacks of a partisan court! They found the Supreme Court still in session. We stayed here and watched the Court until it adjourned and went home, not knowing what would happen here, as he said he had heard of the meeting at Greensboro.

(Mr. OSBORNE: I did not say I had heard of that.)

Well, he had heard enough and had seen enough to make him leave his home and come back twice in extra session, the last time on the eve of the election, to protect the people of North Carolina in the exercise of the great right of suffrage.

Mr. OSBORNE: I want you to state the facts; I did not come back here the second time.

Mr. WATSON: I supposed that Senator Osborne came back with his fellow Senators; if he did not he "sent a hand." Senators, the Legislature came back in July, and every Senator on this floor knows why they came back in July. They know why the necessity was for them to come back in July. The counsel for the respondents stated yesterday that "this Legislature which has adjourned to meet in a few days, ought to pass an act taking from the Supreme Court the power to declare the work of the people at the polls last August unconstitutional. "Don't impeach the Judges," but shackle them. Tie the Court's hands; it is necessary to do it. "Do not remove them, but tie the hands of the Court to keep them from violating the law." And then he stands up here and talks to the Senate of North Carolina about the "independence of the judiciary." There is not a man in the sound of my voice but what knows that anything this Legislature can do can be passed upon by the Supreme Court. There is nothing strong enough to repel the attacks of this

Court upon the people's expressed will if they see proper to brush it out of the way by judicial interpretation. *In pari materia* would be the dagger which would be driven to the hearts of all legislative enactments if it were necessary.

I am through. You have been asked for mercy. I have been taught there is no mercy for me in the world to come, unless I forsake my ways of sin and bow down in repentance because of having committed sin. That is what I have been taught. No plea for mercy can be entertained by any Court so long as the pleader stands up and says, I have committed no wrong, and under the same circumstances I will commit the same act again. These Judges come before this Court and say, We did not violate the laws of North Carolina; we did right in putting our hands into the public treasury, and we will do it again, and your verdict will not amount to mercy, but to a justification of the defendants if you acquit. It amounts to saying to the offenders, Go and do it over again; that is what it means. You are ready for your deliberations; my duty is done. It has been performed and many parts of it have been very unpleasant to me. I have performed it at the instance of these Managers. I came here at the instance of the people of North Carolina, represented by the General Assembly. I have done it the best I could, and it is now ended and the responsibility is now shifted from the shoulders of the counsel for the prosecution and rests upon the shoulders of this solemn Senate. It rests upon your shoulders to perform this duty as men, as the members of a great Court, whose verdict will last forever. These proceedings ought to be bound in permanent volumes that will resist "the corroding tooth of time," for these proceedings will be read by your children and your children's children to the "remotest generation." This will be a precedent made by the great State of North Carolina, always strong in their integrity, always cool in the presence of danger, and it will be a verdict that will go to every part of

the Union, saying that North Carolina stands first and uppermost in the nineteenth century, marking the lines between judicial and legislative branches of the government; it will go as a warning, speaking in tones of advice to the Federal judiciary that is slowly sapping the foundations of the Federal Constitution, which was builded by our fathers. It is a time for a high court of impeachment; the time is ripe. We have been waiting and watching and pleading for years and years; we have suffered by the encroachments of the judiciary. Let the time come when he who receives the great office of Judge in North Carolina shall be such a man as was described by my friend, Judge Bynum, quoting the language of Webster, in regard to Jay, the great Chief Justice of the United States—such a man that, "When the judicial ermine fell upon his shoulders it touched a being as spotless as itself."

Senator LONDON: Mr. President, I ask the adoption of the following order:

"ORDERED, That the vote on the articles of impeachment be now had without further debate."

Senator JUSTICE: I desire to send forward a proposition to amend Rule 19: "Amend the Rules as follows: Add at the end of Rule 19 the following words: 'And each Senator who may so desire may have two minutes to give the reasons for his vote.'"

Senator TRAVIS: Some of the members of the Court, I think, are desirous of getting the views of other members of the Court and to exchange views in regard to the matter. It seems to me to be a good way to arrive at a decision. I do not know of any court where a vote is taken without an exchange of views, and I think it best to have an interchange of views among the members. I make this suggestion on account of what has been said to me by members of the Court.

The PRESIDENT: I will state that under the rules before the vote is taken each Senator has the right to speak

for ten minutes. Without the adoption of your motion they can explain their vote.

Senator BROWN: I understand that every Senator has five days within which to file a written explanation of his vote.

The PRESIDENT: Yes, he has that right.

The proposed order of Mr. London was adopted.

The amendment offered by Mr. Justice to Rule 19 was adopted.

The PRESIDENT: The Clerk will now read the first article of impeachment.

The Clerk thereupon reads the first article of impeachment as follows:

ARTICLE I. That at the time hereinafter named, to-wit, on or about the seventeenth day of October, A. D. 1900, at and in the city of Raleigh, the said David M. Furches, now Chief Justice, who was then an Associate Justice of the Supreme Court of North Carolina, and the said Robert M. Douglas, who was then and is now an Associate Justice of the Supreme Court of North Carolina, and one other member of said Supreme Court of North Carolina, now deceased, concurring therein, constituting a majority of said Supreme Court of North Carolina, unmindful of the high duties of their offices, of their oaths of office, and unmindful of the Constitution of the State of North Carolina, and especially of Article I, sec. 8: "The legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other"; and also Article IV, sec. 9: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action"; and also Article XIV, sec. 3: "No money shall be drawn from the Treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of the public money shall be annually published"; did, under the color of their aforesaid offices, unlawfully, wilfully, and in violation of the aforesaid provisions of the Constitution of the State of North Carolina, and the laws passed in pursuance thereof, in a certain controversy submitted without action to a Superior Court Judge, under The Code of North Carolina, secs. 567 and 568, entitled Theophilus White

against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, pending on appeal in the said Supreme Court of North Carolina, and decided by said Supreme Court on appeal at the February Term, 1900, thereof, cause to be issued by Thomas S. Kenan, Clerk of said Supreme Court, mandamus writs in words and figures following, to-wit:

(COPY FOR H. W. AYER, AUDITOR.)

"State of North Carolina—In the Supreme Court.

"THEOPHILUS WHITE
"AGAINST
"H. W. AYER, AUDITOR, AND W. H. WORTH, TREASURER.

"*The State of North Carolina*
to Hal W. Ayer, State Auditor—Greeting:

"This is an action of mandamus upon a money demand for salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to issue. From which judgment the defendants appealed to this Court, where the judgment of the Court below was modified in the amount of the recovery, and, as modified, the judgment of the Court was affirmed; and that the said judgment as modified and affirmed entitled plaintiff to a salary of four hundred dollars per annum, as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile traveled when engaged in the business of said Commission, and for other extra expenses not to exceed fifty dollars per annum—whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the Court that the defendant Hal W. Ayer, as State Auditor, shall proceed to pass upon and audit said claims, upon the same being properly certified by the Secretary of the Board of Shell-Fish Commission, and countersigned by the Chairman of the Shell-Fish Commission.

"Now, therefore, you are hereby commanded, absolutely and peremptorily, without delay, to proceed to audit said accounts upon their being so presented to you. And that you at once, upon auditing the same, issue warrants therefor upon the State Treasury for such amounts as you shall find to be due the plaintiff thereon; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

"Witness: Thomas S. Kenan, Clerk of our said Court, at office in Raleigh, this the 17th day of October, 1900.

"THOMAS S. KENAN,
"*Clerk of the Supreme Court.*"

(Seal of the Supreme Court of the State of North Carolina.)
Fee paid.
Endorsed: Received October 17, 1900, and served same day by delivering the original of the within to Hal W. Ayer, State Auditor.

"R. H. BRADLEY,
"*Marshall of the Supreme Court of North Carolina.*"

"Fee paid R. H. B."

(COPY FOR W. H. WORTH, TREASURER.)

"State of North Carolina—In the Supreme Court.

"THEOPHILUS WHITE
"AGAINST
"H. W. AYER, AUDITOR, AND W. H. WORTH, TREASURER.

"*The State of North Carolina*
to W. H. Worth, State Treasurer—Greeting:

"This is an action of mandamus upon a money demand for a salary, tried upon a case agreed in the Superior Court of Perquimans, where the plaintiff recovered judgment and the writ of mandamus ordered to issue. From which judgment the defendants appealed to this Court, where the judgment of the Court below was modified in the amount of the recovery, and as modified, the judgment of the Court below was affirmed; and that the said judgment as modified and affirmed entitled the plaintiff to a salary of four hundred dollars per annum as Chief Inspector of the Shell-Fish Commission, five cents per mile for each mile traveled when engaged in the business of said Commission, and for other extra expenses not to exceed fifty dollars per annum—whole cost of the Commission not to exceed six thousand dollars per annum. And it being further declared by the Court that the defendant Hal W. Ayer, as State Auditor, shall pass upon and audit said claims upon the same being properly certified by the Secretary of the Board of the Shell-Fish Commission, and countersigned by the Chairman of the Shell-Fish Commission; and it being further declared that the defendant W. H. Worth, State Treasurer, shall pay the amount stated in the warrant drawn by the defendant Hal W. Ayer, as Auditor aforesaid.

"Now, therefore, you are commanded, absolutely and peremptorily, without delay, to pay the warrants issued as aforesaid by the State Auditor on you as State Treasurer in favor of the plaintiff; and that in all things you comply with and obey the mandates and requirements of this writ, and that herein you fail not.

"Witness: Thomas S. Kenan, Clerk of our said Court, at office in Raleigh, this 17th day of October, 1900.

"THOMAS S. KENAN,
"*Clerk of the Supreme Court.*"

(Seal of the Supreme Court of the State of North Carolina.)
Fee paid.

Endorsed: "Received October 17, 1900, and served same day by delivering the original of the within to W. H. Worth, State Treasurer. R. H. BRADLEY,
"*Marshall of the Supreme Court of North Carolina.*"

"Fee paid. R. H. B."

That, pursuant to the command contained in the aforesaid writ of mandamus, issued to said Hal W. Ayer, State Auditor, the sum of eight hundred and thirty-one and 15-100 dollars was unlawfully audited and allowed by said Hal W. Ayer, State Auditor, and a warrant on the State Treasurer was issued by said Hal W. Ayer, State Auditor, in words and figures following, to-wit:

(COPY OF AUDITOR'S WARRANT.)

"No. 22962. $831.15.

"STATE OF NORTH CAROLINA,

"*Auditor's Department.*

"RALEIGH, N. C., Oct. 20, 1900.

"The State Treasurer will pay to Theophilus White, C. I. S. F. C., or J. C. L. Harris, attorney, or order, eight hundred and thirty-one and 15-100 dollars, for salary as Chief Inspector Shell-Fish Commission, compensation for extra services and mileage from March 20, 1899, to September 1, 1900.

"Charge account Shell-Fish Commission.

"HAL W. AYER,
"*State Auditor.*

"R. C. RIVERS, *Chief Clerk.*"

"Code N. C., vol. 1, sec. ....
"Code N. C., vol. 2, sec. ....
"Chapter 13, sec. 12, Laws 1897.
"Chapter 19, secs. 1 and 2, Laws of 1899.
"Supreme Court Decision, February Term, 1900."

Which said warrant was subsequently, on the 22d day of October, 1900, pursuant to the command contained in the aforesaid writ of mandamus, directed to said W. H. Worth, State Treasurer, unlaw-

fully paid by said W. H. Worth, State Treasurer, out of the funds in his hands as State Treasurer, belonging to the State of North Carolina, without any appropriation being made by law for the payment thereof, to aforesaid Theophilus White; which aforesaid mandamus writs were unlawfully issued as aforesaid, with the intent thereby to compel, by process in the nature of execution, the payment of the aforesaid sum of eight hundred and thirty-one and 15-100 dollars out of the State Treasury in violation of the aforesaid provisions of the Constitution; whereby the said David M. Furches, then Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, of the Supreme Court of North Carolina, did then and there commit, and were guilty of, a high crime and misdemeanor in office.

The PRESIDENT: As each Senator's name is called he will rise and await the question to be put by the President, as follows:

"Mr. ....., how say you, are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in the first article of impeachment?

The Clerk will call the roll.

The Clerk thereupon called the roll and the following Senators voted "Guilty."

Messrs. Alexander, Arrington, Aycock, Bray, Broughton, Burroughs, Calvert, Foy, Gudger, James, Justice, Lindsay, McNeill, Miller of Pamlico, Morrison, Morton, Scott, Smith, Speight, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—27.

And the following Senators voted "Not guilty:"

Messrs. Brown, Buchanan, Candler, Crisp, Currie, Dula, Foushee, Glenn, Henderson, Leak, London, Long, Marshall, McAllister, McIntosh, McIntyre, Michael, Miller of Caldwell, Pinnix, Robeson, Stikeleather, Stringfield and Sugg —23.

When the name of Senator GUDGER was called he said:

MR. PRESIDENT:—The framers of our Constitution deemed it wise to divide our State Government into three co-ordinate branches—the Legislative, Executive and Judi-

cial—each to possess widely different powers, each interdependent on the other, all to act harmoniously.

One makes the law, provides the revenue, and controls disbursements.

One enforces the law, with power to exempt persons from the operations of the law.

One construes the law, administers the law; but all governed by the Constitution, limited by the Constitution, compelled to obey the Constitution.

We find these three branches of our government jealous of their rights, though often transcending their power. One great assignable reason for this is the political prejudice of partisanship, the other the extreme desire for power. Precedent is quoted as authority, but we must recognize the important necessity of recurring to the fundamental law, the corner-stone, as unlawful encroachments can always find a precedent, hence that which is cited as authority and justification will be found an infringement, doing that which is forbidden.

The well-marked lines must be strictly observed, and zealously enforced, otherwise we will launch out on the sea of uncertainty.

Article 4, section 9, of our State Constitution provides: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decision shall be merely recommendatory. No process in the nature of an execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

The judicial branch of the government can not invade the legislative; the language of the Constitution is plain, the spirit wise, the purpose clear. This provision can not be changed, or its spirit thwarted by any species of reasoning, and every attempt, or effort to do so, demands a protest from every patriotic citizen.

The Supreme Court, in *White v. State Auditor and State*

Treasurer, entered up a judgment for plaintiff, the amount to be ascertained by the Auditor, under certain prescribed rules, ordering him to audit the claim, and issue a warrant therefor, and commanding the Treasurer to pay the amount so audited. In effect, it was a judgment for the plaintiff White, and furnished him with a process to compel the Auditor to audit his claim, and the Treasurer to pay it when so audited.

The respondents had actual notice that the General Assembly had expressly withdrawn this appropriation as to White. They had notice of the intention and purpose of the General Assembly; they knew their action precipitated a conflict between the Legislative and Judicial Departments of the government, but, unmindful of the consequences,disregarding the mandates of the Legislative will, utterly disregarding this plain provision of the Constitution, they started in motion a writ that invaded the Legislative Department, unlocked the treasury, and by judicial process coerced the payment of a claim against the State. The amount involved may be ever so small, but the principle is the question in controversy. If the Court is authorized to judicially order the payment of a small amount, it likewise has power to order the payment of any amount.

In arriving at a just conclusion of this case, I have endeavored to conscientiously perform my duty. The task has been unpleasant; my action will bring sorrow to others, but the preservation of the Constitution, the protection of the Legislative Department from the invading hand of the Judicial Department requires me to perform an unsought grave duty.

I therefore find Chief Justice David M. Furches and Associate Justice Robert M. Douglas guilty of high crimes and misdemeanors in office.

When the name of Senator JUSTICE was called, he said:

MR. PRESIDENT:—I can not agree to convict the respondents for mere error in judgment, however much I may differ from them in opinion as to the law, unless improper motives have actuated them in their decisions, and unless that clearly appears. I thought at the time they were passed, that the Acts of 1899, which the Court has declared void, were constitutional and valid laws, and I still think so, but I do not wish to convict the respondents for differing from me in opinion; I yield respectful deference to the decision of the Court on the law, but the Court, in my opinion, has no right to refuse process which the law guarantees to the citizen, as the writ of *habeas corpus,* or, on the other hand, put in force some process of the Court in a case where it is forbidden by the Constitution, as issuing a writ of mandamus against the Treasurer of the State to compel him to pay out money without the direct authority of the Legislature. (These are instances.) In the case we are trying, a mandamus was issued by them to compel the Auditor of the State to audit a claim and against the Treasurer of the State to pay the claim to Theophilus White; upon which and by virtue of the writ of mandamus, the money was paid out of the treasury of the State. Did respondents direct the writ to issue? They testify that they did, in the opinion in *White v. Auditor.* The testimony shows that they did in conference, and this is not denied. Was this forbidden by the Constitution? Art. IV, sec. 9, of the Constitution, says: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

The General Assembly, by Chapter 21, of the Acts of 1899, forbade the payment of money, on account of which White's claim was based, to any person except those named in Chapter 18 of said acts. This is the plain effect of the

act. And this act withdrew any appropriation theretofore made, so far as White was concerned. So I conclude that the ordering of the writ of mandamus was in direct conflict with the Constitution of the State and contrary to the plain provisions of the law of the land, and against the express will of the Legislature. I can not give my assent to this act of the respondents, and the precedent which is thus established, in putting in force the powerful mandate of the Court to go into the public treasury and take money therefrom, contrary to the Constitution and against the clearly expressed will of the representatives of the people. I regard this as a flagrant violation of the Constitution and laws, and an assumption of power by the Court that is dangerous. I think, for these reasons, the respondents are guilty of the charges contained in the first article of impeachment, and I so vote.

When the name of Senator LINDSAY was called, he said:

MR. PRESIDENT:—Thinking more of the welfare of my State than of any man, or set of men, and believing that the Constitution has been violated, I vote "Guilty."

When the name of Senator LONDON was called, he said:

MR. PRESIDENT:—In explaining my vote, I believe that a majority of the fair-minded people of North Carolina will approve of the vote I will now give. I am quite sure that the next and more impartial generation will approve it. But my motives are not influenced by what others say or think, but by my conscience and the obligations of my oath as a sworn juror. The rules of evidence applying in a criminal case apply to this case, and therefore I give the respondents the benefit of a reasonable doubt and vote "Not guilty."

When the name of Senator McNEILL was called, he said:

MR. PRESIDENT:—An explanation of my vote will be given in a written opinion, which I will file. I vote "Guilty."

When the name of Senator MORTON was called, he said:

MR. PRESIDENT:—In performing so solemn a duty, I desire to record in the permanent annals of history a brief outline of the reasons that control me in my vote. It is certainly an unpleasant duty that causes any man to vote to degrade his fellow-man and forever afterward debar him from voting or holding public office, but if anyone should respect the Constitution and laws of the State, the Justices of the highest tribunal in the land should be the ones to set the example. Senators, in defiance of both legislative enactment and constitutional provision, these respondents have, by mandamus, put their hands into the public treasury, and without warrant of law, ordered money paid out in plain and direct violation of Art. IV, sec. 9, and Art. XIV, sec. 3, of the Constitution of the State.

The latter article of the Constitution reads: "No money shall be drawn from the treasury but in consequence of appropriations made by law; and an accurate account of the receipts and expenditures of public money shall be published." The evidence shows that no appropriation was made by law for White, but these respondents claim in their answer on page 20, that White was entitled to pay under Chapter 19 of the Laws of 1899, at the rate of $400.00 per year and travelling expenses, provided that expenses do not exceed six thousand dollars per year. Now, when I turn to pages 180 to 183 of Auditor's report of disbursements as provided in the Constitution, I find that $9,281.62 had already been paid out (during the year) at the time the mandamus was issued. This, to me, is an acknowledgment of their guilt made in their answer to the charges, and I can not conscientiously but vote "Guilty."

When the name of Senator TRAVIS was called, he said:

MR. PRESIDENT:—In reviewing the facts bearing upon the article, I find that in the case of *White v. Hill,* the respondents held that White was Chief Inspector of the Oyster Industry, at a salary of $75.00 per month under the Act of

1897, and the Board of Shell-Fish Commissioners. The question as to how White should get his pay was not then involved.

About six months later the case of *White v. Auditor* came before them, in which White was seeking to get pay. Judge Clark pointed out to them the fact that there was no appropriation for White's salary; that Chapter 21 of the Laws of 1899, plainly excluded him from the appropriation in Chapter 19; that his claim was a claim against the State, and no writ could issue to enforce it except in plain violation of the Constitution. Judge Montgomery told them in his dissenting opinion, that even if it were admitted that there was an appropriation, it could not be drawn lawfully for the reason that the statute provided that it should only be paid out upon a certificate of the Secretary of the Board of Shell-Fish Commissioners, countersigned by the chairman of said board, and the Court had, six months prior thereto, in *White v. Hill,* abolished that board. The Court itself had destroyed the machine through which alone that appropriation could be lawfully reached.

The Court evidently to dodge that unanswerable argument declared White to be chairman of the dead board, and his clerk secretary thereof, and ordered the Auditor and Treasurer to pay out the money to White, not according to law, but according to the statute as near as may be, or, in effect, pay it according to law if you can, but if you can not pay it according to law, then pay it anyway.

I can come to no other conclusion but that they wilfully compelled the payment of this money contrary to, and in disregard of, the law, and I vote "Guilty."

When the name of Senator WARD was called, he said:

Mr. President:—I desire to record a brief explanation of my vote. I can not enter into a legal opinion that would be satisfactory in the space allotted under the rules of the Court and will content myself with a brief outline,

dealing summarily with both the legal and moral phases of the case as they appear to me. I am first confronted with the question whether the issuance of the peremptory mandamus to the Auditor and Treasurer was a violation of section 9, Art. IV, of the Constitution. I am urged to say that it was not, because the subject-matter of the action in which it was issued was not a claim against the State, it being a question whether the plaintiff was entitled to be paid his demand for both a salary and unascertained and uncalculated expenses. I have thought of this studiously. It is said that the "office-holding cases" are well decided in holding that an officer occupies a contractual relation to the State which can not be impaired by revocation by the Legislature during his term and his demand of salary is not a claim against the State in contemplation of the section of the Constitution above referred to; but it is expressly admitted that if an artisan builds a structure under a contract with the State his demand for the contract price is a claim under said section.

The high source from which this proposition proceeds is its only claim to respectful recognition. I can not think it was addressed to us with a serious intention or presumption that it would be entertained. I answer, therefore, that it was a claim against the State, such as contemplated by the Constitution. I am further urged to say that there was an appropriation existing under Chapter 16, Acts of 1897, and Chapters 18, 19 and 21, Acts of 1899, directed to the payment of White's salary and expenses. But the Act of 1899, chap. 21, expressly says that no person shall be paid except those authorized to act under chapter 19, and names them specifically, conspicuously omitting White.

If it had said, "Authorized under the laws of this State," then by invoking the doctrine *"in pari materia"* White might possibly had a pretext of a showing; but that doctrine can not safely be extended to the total abolition of the identity of a particular specified chapter of the Public Laws. I

therefore must say no to this request. And how happens it that those parties named in the act fail of any recognition at the hands of the Court and at the door of the treasury? The only answer is, By judicial legislation I am driven thus to the conclusion that section 9, Art. IV, of the Constitution of my State was deliberately violated by the respondents by the issuance of the writ "in the nature of an execution" against the State.

I further conclude that the acts of the Legislature were designedly construed away by the respondents and the functions of the Legislature grossly usurped, thus violating the plainest proposition in the Constitution, which distinguishes and sets apart the three co-ordinate branches of the government, which seems to me to be the firmest and most important pillar that aids in the support of the great and glorious superstructure of our State Government. It is contended that the act of the Judges was a construction of the law or an error in which a Judge is not impeachable until corrupt motives, as a distinct feature of the charge, is affirmatively shown. I answer that a Judge is not impeachable for a common error of judgment in construing general statutes or unravelling knotty questions of law; but that a distinct exception exists in the case of the construction of an act, or a clause of the Constitution which, in itself, marks a definite limit to his authority. In that, he stands on equality with the citizen whose conduct is hemmed in by the law of the land, and the intent is implied from the commission of the act. It will not do to say that the citizen doesn't have to construe the law; the very reading of it involves construing it, certainly the understanding of it must. I try these Judges as I would my equals in life, for though my superiors in position, they are but men.

They say they acted on agreed facts which admitted the existence of an appropriation. If the State officers or anybody else can admit away the acts of the Legislature, we have a curious anomaly in government.

There was not sufficient of the oyster fund in the treasury to pay it, it was therefore paid in part from the general fund. If this can be done, where is the limit and where is the safety of the public funds from conniving officers and ignorant courts? I can not vote to sanction it.

> "There's no power in Venice can alter a decree established.
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the State. It can not be."

In a very short public service embracing only two terms in the Senate, I have been twice required to pass upon charges of official misconduct in this State. What is the matter with public service? May not the people well and wisely become alarmed for the safety of the honor of the State? Is there anything so much calculated to agitate them? Is not purity in the public service of the first importance to the safety of the State, the security of property, the peace of our streets and the happiness of our homes? I hold it to be the pivot upon which swings the needle of hope that points the generations of the future to the enjoyment of our splendid institutions.

Then let the representatives of the people carefully scrutinize it, and let this high Court—the only agency set apart to that end—safely guard it and hold public officials to strict accountability, disdaining and repelling the dangerous proposition seemingly urged here in behalf of these respondents that the unlettered private citizen should be tried by a harsher rule than he who is chosen for his learning to administer the laws of the State.

The conclusion from the facts given in evidence in this case is irresistible by me, that many of the "office-holding" cases are defiantly thrown in the teeth of the Legislature of '99. They are irreconcilable upon legal grounds, but upon the ground of political machinery moved by the usurping arm of a partisan judiciary, they all blend into a happy and

harmonious union. A Justice of the Court asks to put on the minutes of the Court a protest against what he thinks is an infringement of the organic law. He is met not only with a positive refusal from the whole Court, but from one member: "You are writing politics when you protest against this Court putting its hand in the public treasury or annulling the statutes of this State," the slightest evidence of which is absent from it so far as I can see. Another says: "Put your dissent against this action of the Court in the columns of obituaries." I would add to that sentence to make it complete, "that it may moan the requiem of a Constitution that gradually dies under the strokes of my judicial battle-axe." Another says: "So much has been said about this matter that I prefer to keep my copy and not return it." Was this trial anticipated?

The only excuse given is, first, there had been one dissent from the judgment in the case. I reply, suppose there had been fifty, what of that? Second, "there was nothing before the Court." I reply, that having seen fit to enter judgment there for a money demand, there was a case pending until its settlement; but if not correct in that that it is not necessary that a case should be on trial to open the minutes of the Court to a Justice.

The colloquy related above doesn't sound to me like the language of North Carolina Judges around the council board of the highest tribunal of the State, and I disapprove it; I denounce it; I condemn it. If not such overt acts of misconduct as to warrant removal from office, it affords strong corroboration of overt acts proven in this case. I am convinced beyond any doubt reasonable to my mind that the Constitution and statute law of the State has suffered violence at the hands of the respondents, and that for the acts alleged and proved they are impeachable, and I therefore vote "Guilty" on all five articles.

When the name of Senator WEBB was called, he said:

The Constitution of our State is the supreme, organic, written law, to support which every man before he can vote, and every officer before entering upon his official duties must take a solemn oath. The Judges ought to be the readiest and quickest to maintain and defend this great instrument, because they are familiar with its provisions.

Art. IV, sec. 9, of this instrument provides that the Supreme Court shall have original recommendatory jurisdiction of all claims against the State, but that said Court shall not issue any process in the nature of execution on such claim, and the decision of said Court shall be reported to the ensuing General Assembly for action thereon.

It is clear to my mind that White's claim for salary, mileage, and other incidental expenses, is a claim against the State; and the respondents should have followed the positive letter of said Art. 4, section 9, of the Constitution.

The Shell-Fish money was in the hands of the State Treasurer just as the educational funds were in his hands. It was the State's money. The Legislature, by its sovereign taxing power, raised the money and placed it in its servant's hands for the uses prescribed by that sovereign body at its session of 1899. Therefore, if White was due anything, it was due him by the State, and hence the respondents ought not to have ordered the high execution writ of mandamus to issue against the State Auditor and Treasurer and compelled the Treasurer to pay out the State's money. In doing so, the respondents, as I see it, have offended against the said article and section of the Constitution.

The Legislature of 1899 in unmistakable terms withdrew all appropriation of which White might have taken advantage, and reannounced this purpose to the world in the joint resolution of June, 1900.

The respondents nullified and abrogated Chapter 21, Laws 1899, which, in my opinion, was a lawful act by the sovereign people, and ought not to have been uprooted and set

aside by the respondents, nor ought they have issued mandamus ordering White paid when there was positively no appropriation with which to pay him. Viewing their action as I do, I am compelled to vote "Guilty."

When the name of Senator WOODARD was called, he said:

MR. PRESIDENT:—At the proper time, and in the proper place, I may avail myself of the rule of this Court and state the reasons for the conclusion which I have reached. I can not presume that any explanation of the vote which I am now about to give would either interest or instruct others. As I stand here charged with the double duty, as a member of this Court, of determining the law and finding the facts necessary to support the charges contained in Art. I of the impeachment, it is enough for me to know that I alone am answerable to my conscience.

Having listened patiently and attentively to the evidence adduced and the arguments made in the progress of this trial, reminded of the solemn sanction of my oath, I will follow the advice offered by the distinguished counsel who concluded for the respondents: "Perform the duty of the hour, and fling defiance at the future." I therefore vote "Guilty."

The PRESIDENT: The Clerk announces 27 Senators as having voted "Guilty" and 23 as having voted "Not guilty." There being a failure of a concurrence of two-thirds of the Senators voting guilty, David M. Furches and Robert M. Douglas are acquitted on the first article of impeachment.

Mr. Manager ALLEN:

MR. PRESIDENT:—I desire to say, Mr. President, that the Board of Managers and the counsel who represent them desire to express in the first place their thanks to the presiding officer and to the members of the Court for the courtesies shown them during this trial. We brought this case to this

Court of Impeachment believing our cause was just, and that the allegations as contained in the articles of impeachment were true. We have submitted that case to this Senate, and we believe and say that it has received at the hands of this Senate a full and conscientious hearing. While we do not agree with the conclusion reached, we desire to yield to the judgment of the Senate, without criticism, and to abide in good faith by its action. I hope, Mr. President, that the future will show that the action of the Senate to-day has been wise for North Carolina. In our opinion, the most serious charge is contained in the first article of impeachment. That has not been sustained by the necessary two-thirds vote required by the Constitution, and believing that the most serious charge is contained in the first article, the Board of Managers, after conference with their attorneys, are willing either that the other charges shall be withdrawn, or, if it is preferred to take the other course, that a verdict of "Not guilty" may be entered as to each of the other articles, provided this meets with the approval of the Senate.

Senator ARRINGTON: I move that a verdict of "Not guilty" be entered as to each of the other four articles of impeachment.

Senator JUSTICE: I have no objection to that course, but if the Senators are to go upon record, so far as I am concerned, until we come to the last article my vote would be as it has been upon the first article; I should not, however, vote that way upon the last article upon the grounds stated in the paper I read to this Court in my vote upon the first article. I do not know whether it is the purpose of the Senator from Nash that it be a unanimous verdict, that there shall be a unanimous verdict upon the other articles or not. I do not think that would put me in the proper light. On articles 2, 3 and 4, my vote would be as it was on the first article, "Guilty." But I should not want to vote that way on the last article.

Senator WOODARD: I concur with Mr. Justice, if the members are to go on record. I am unwilling to go on record without an expression of my views. I want to say I fully concur in his statements, and I want to go on record as such. I have no feeling in this matter, and I would not be willing to vote for the fifth article, because I do not think the evidence adduced before the Court would justify me in finding the facts claimed. I am therefore obliged to ask that I shall appear properly on the record.

Senator FOUSHEE: I should like to ask if the rules do not require that the voting be continued. Is that correct? I think that is required by the rules, unless the Managers, by consent, withdraw their articles.

Senator MORTON: I hope Senator Arrington will withdraw his motion. It seems to me it is out of order.

Senator ARRINGTON: I withdraw the motion.

Senator Morrison: I think if it is agreed by both sides they can withdraw the articles.

Senator HENDERSON: Let's vote on the several articles as the Senators desire to go on record. It will not take long to call the roll.

Senator JUSTICE: I do not think the articles can be withdrawn except by consent of the counsel upon the other side.

The PRESIDENT: I understood they had consented.

Mr. JARVIS: The counsel for the respondents have neither assented nor dissented.

The PRESIDENT: The Clerk will read the second article of impeachment.

The Clerk reads the second article of impeachment as follows:

ARTICLE II. That at the time hereinafter named, to-wit, on or about the 17th day of October, A. D. 1900, at and in the city of Raleigh, the said David M. Furches, now Chief Justice, who was then an Associate Justice of the Supreme Court of North Carolina,

and the said Robert M. Douglas, who was then and is now an Associate Justice of the Supreme Court of North Carolina, and one other member of said Supreme Court of North Carolina, now deceased, concurring therein, constituting a majority of the said Supreme Court of North Carolina, did usurp legislative authority and did assume to themselves legislative functions, and, intending to bring the General Assembly of North Carolina into disrepute, public scandal and disgrace, unmindful of the high duties of their office as members of the said Supreme Court of North Carolina, and of their oaths of office, and in contempt, disregard and defiance of the provisions of chapter 21, Public Laws of North Carolina, session of 1899, ratified the 8th day of March, A. D. 1899, entitled, "A supplemental act to an act entitled 'An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina,' and ratified on March 2, 1899," did, under the color of their aforesaid offices, unlawfully, wilfully, and in violation of the aforesaid provisions of the Constitution of the State of North Carolina, and in disregard and contempt of the Acts of the General Assembly aforesaid, in the aforesaid controversy submitted without action to a Superior Court Judge under The Code of North Carolina, secs. 567 and 568, entitled, "Theophilus White against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer," pending on appeal in the said Supreme Court of North Carolina, and decided by the said Supreme Court at the February Term, 1900, thereof, cause to be issued by Thomas S. Kenan, Clerk of said Supreme Court, the mandamus writs aforesaid.

And pursuant to the command contained in said writs of mandamus the claim for the sum of eight hundred and thirty-one 15-100 dollars was unlawfully audited and allowed by said Hal W. Ayer, State Auditor, in favor of said Theophilus White, as set forth in the aforesaid Auditor's warrant, and the aforesaid warrant on the State Treasurer was issued by said Hal W. Ayer, State Auditor, and said Auditor's warrant was unlawfully paid by said W. H. Worth, State Treasurer, out of the funds in his hands belonging to the State of North Carolina in the treasury thereof, contrary to the provisions of the aforesaid supplemental act of the said General Assembly, ratified as aforesaid on the 8th day of March, A. D. 1899, which aforesaid mandamus writs were unlawful and contrary to the aforesaid provisions of the Constitution of the State of North Carolina and the acts of the General Assembly of North Carolina, and in disregard and contempt thereof, and were issued as aforesaid with the intent thereby to compel, by process in the nature of an execution, the payment of the said sum of eight hundred and thirty-one and 15-100 dollars out of the State Treasury, in violation of the aforesaid provisions of the Constitution and the Public Laws of the State of North Carolina.

Whereby the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, did then and there commit, and were guilty of, a high crime and misdemeanor in office.

The roll is called, and, upon the question being put, "How say you, are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in the second article of impeachment?" the following Senators voted guilty:

Senators Alexander, Arrington, Bray, Broughton, Burroughs, Calvert, Foy, James, Justice, McNeill, Miller of Pamlico, Morrison, Morton, Scott, Smith, Speight, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard —24.

And the following Senators voted "Not guilty:"

Senators Aycock, Brown, Buchanan, Candler, Crisp, Currie, Dula, Foushee, Glenn, Gudger, Henderson, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, Michael, Miller of Caldwell, Pinnix, Robeson, Stikeleather, Stringfield and Sugg—26.

When the name of Senator STRINGFIELD was called, he said:

MR. PRESIDENT:—I had had honest doubts and I gave the defendants on my first vote the benefit of the doubt. I have no doubt that the Judges acted indiscreetly, if not unlawfully, but having doubts, I gave my first vote as I give this, "Not guilty."

The PRESIDENT: The Clerk announces 24 as having voted "Guilty" and 26 as having voted "Not guilty," there being a failure of concurrence of two-thirds of the Senators voting "Guilty," David M. Furches and Robert M. Douglas are acquitted on the second article of impeachment.

The PRESIDENT: The Clerk will read the third article of impeachment.

The Clerk reads the third of article of impeachment as follows:

ARTICLE III. That the aforesaid controversy without action, entitled as aforesaid, Theophilus White against Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, was decided by the said Supreme Court of North Carolina, on or about May 22, 1900, at the February Term of the said Court, and prior to the 14th day of June, 1900, said Supreme Court had adjourned for the term without directing any mandamus writs to issue in said cause; and that on the 14th day of June, 1900, the General Assembly, being in adjourned session, passed the following resolution, to-wit:

"*Resolved by the House of Representatives, the Senate concurring*, That a committee of two members of this House be appointed by the Speaker, who shall wait upon the State Treasurer, and ascertain from him if he has paid out any money to Theophilus White, and if so, by what authority he made such payment."

That, pursuant to the aforesaid resolution, a committee was appointed who visited the office of the said State Treasurer and ascertained from him, and reported to the General Assembly, that no money had been paid to said Theophilus White, as Chief Inspector Shell-Fish Commission, since the passage of the act entitled "An act to provide for the general supervision of the Shell-Fish Industry in the State of North Carolina," ratified the 2d day of March, 1899, and the supplemental act, ratified March 8, 1899, entitled "A supplemental act to an act entitled 'An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina,'" ratified March 2, 1899.

But subsequently, to-wit, on or about the 17th day of October, 1900, notwithstanding the passage of the aforesaid resolution of inquiry, and notwithstanding that it was well known to said Suprme Court that the General Assembly had asserted its right, as guaranteed by the Constitution of North Carolina, to control the disbursement of money in the State Treasury, and to forbid the payment of money out of said treasury to said Theophilus White under the decision aforesaid, a majority of the members of the Supreme Court, including said David M. Furches, Associate Justice (now Chief Justice), and said Robert M. Douglas, Associate Justice, did, thereafter, to-wit, on or about the 17th day of October, 1900, at and in the city of Raleigh, in contempt and defiance of said General Assembly and the acts thereof, and in violation of the aforesaid provision of the Constitution in that behalf, knowingly, wilfully and wrongfully direct and cause the aforesaid writs of mandamus to be issued, whereby said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, then and

there did commit and were guilty of a high crime and misdemeanor in office.

The roll is called, and, upon the question being put, "How say you, are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in the third article of impeachment?" the following Senators responded "Guilty:"

Senators Alexander, Arrington, Bray, Broughton, Burroughs, Calvert, Foy, James, Justice, McNeill, Miller of Pamlico, Morrison, Morton, Scott, Smith, Speight, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard —24.

And the following respond "Not guilty:"

Senators Aycock, Brown, Buchanan, Candler, Crisp, Currie, Dula, Foushee, Glenn, Gudger, Henderson, Leak, Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, Michael, Miller of Caldwell, Pinnix, Robeson, Stikeleather, Stringfield and Sugg—26.

The PRESIDENT: There being a failure of concurrence of two-thirds of the Senators voting "Guilty," David M. Furches and Robert M. Douglas are acquitted on the third article of impeachment.

The PRESIDENT: The Clerk will read the fourth article of impeachment.

The Clerk reads the fourth article of impeachment as follows:

ARTICLE IV. That on or about the 17th day of October, 1900, at and in the city of Raleigh, the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, and one other member, now deceased, of the said Supreme Court of North Carolina, constituting a majority of the said Supreme Court, directed the aforesaid peremptory writs of mandamus to be issued, and they were issued by said Thomas S. Kenan, Clerk of said Supreme Court; that said writs of mandamus were not issued in conformity to law, nor according to the orderly course and practice of the Courts, in this, that:

Specification 1. That Article IV, section 9, of the Constitution of North Carolina, confers upon the Supreme Court "original juris-

diction to hear claims against the State," and no statutory enactment has ever been provided to the contrary since the adoption of the aforesaid Constitutional provision; that the aforesaid controversy, submitted without action, to-wit, the controversy submitted without action of Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, hereinbefore referred to, as the record thereof fully shows, involved a claim of the said Theophilus White against the State of North Carolina, and the mode or manner by which payment thereof might be enforced, and it is nowhere provided, either in the Constitution or statutory laws of North Carolina, that such a controversy without action can be submitted to the adjudication of a Superior Court Judge, and especially to a Superior Court Judge holding Court in a county other than the county of Wake.

That the said Hal W. Ayer, State Auditor, and the said W. H. Worth, State Treasurer, could not lawfully have been sued in the county of Perquimans on account of the matters set forth in said controversy submitted without action, as was done in the aforesaid controversy submitted without action in the Superior Court of Perquimans County, nor is it provided either in the Constitution or statutory laws of North Carolina that the aforesaid Supreme Court of North Carolina should have appellate jurisdiction therein.

Specification 2. That the aforesaid mandamus writs were directed to be issed as aforesaid, in wilful disregard of the statutory provisions relating to the application for writs of mandamus.

Specification 3. That the aforesaid mandamus writs were directed to be issued, and were issued as aforesaid, contrary to the course, practice and procedure of the said Supreme Court of North Carolina.

Specification 4. That the aforesaid mandamus writs were directed to be issued, and were issued as aforesaid, in disregard of the provisions of chapter 19 of the Public Laws of 1899, entitled "An act to provide for the general supervision of the Shell-Fish Industry of the State of North Carolina," ratified the 2d day of March, A. D. 1899, and in a manner designated by the Supreme Court, without any legislative authority whatever; and also in disregard and defiance of chapter 21 of the Public Laws of 1899.

Specification 5. That well knowing that two of the Associate Justices of the Supreme Court of North Carolina did not concur with the aforesaid majority of the Court in directing the aforesaid mandamus writs to be issued, one of the dissenting Associate Justices, claiming the right to do so, was refused and prevented by the aforesaid majority of the Supreme Court, including the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, from entering his protest against the issuing of said mandamus writs upon the minutes of

the said Supreme Court, and was also denied the right to file his opinion, giving his reasons and grounds for dissenting from the action of the said Supreme Court in directing the aforesaid mandamus writs to be issued.

Whereby the aforesaid David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice, did then and there commit and were guilty of a high crime and misdemeanor in office.

The PRESIDENT: The Clerk will call the roll.

The Clerk calls the roll, and, upon the question being put, "How say you, are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in the fourth article of impeachment?" the following Senators vote "Guilty:"

Senators Alexander, Arrington, Bray, Broughton, Burroughs, Calvert, Foy, James, Justice, Lindsay, McNeill, Miller of Pamlico, Morrison, Morton, Scott, Smith, Speight, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—25.

And the following vote "Not Guilty:"

Senators Aycock, Brown, Buchanan, Candler, Crisp, Currie, Dula, Foushee, Glenn, Gudger, Henderson, Leak, London, Long, Marshall, McAllister, McIntyre, Michael, Miller of Caldwell, Pinnix, Robeson, Stikeleather, Stringfield and Sugg—25.

The PRESIDENT: There being a failure of concurrence of two-thirds of the Senators voting "Guilty," David M. Furches and Robert M. Douglas are acquitted of the fourth article of impeachment.

The PRESIDENT: The Clerk will read the fifth article of impeachment.

The Clerk thereupon reads the fifth article of impeachment as follows:

ARTICLE V. That the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, with their con-

curring associate, constituting a majority of the said Court, unmindful of the high duties of their offices, of their oaths of office, and in violation of the Constitution of North Carolina, at various times and in numerous decisions of said Court, commonly known as the "office-holding cases," and so designated by Robert M. Douglas, Associate Justice, in his concurring opinion in the aforesaid case of Theophilus White v. Hal W. Ayer, State Auditor, and W. H. Worth, State Treasurer, persistently, wilfully and unlawfully, and intending to bring into contempt, disrepute and public scandal the General Assembly of North Carolina, and to nullify and render of no effect the acts thereof, did, by a specious course of reasoning, wherein they declare the said acts constitutional, in whole or in part, as suited their said purpose, or disregarded the true meaning and intent thereof, nullify, destroy, and in effect repeal said acts of the General Assembly, and contemptuously thereby did annul and defeat the legislative will expressed within the scope of its constitutional authority, in derogation of the Constitution and laws of North Carolina; and that, in culmination and consummation of said persistent, wilful and unlawful intent to discredit and bring into public contempt the said General Assembly of North Carolina, and the laws passed by the said General Assembly, and to impair and destroy its power and to nullify and abrogate the laws thereof, the said David M. Furches, Associate Justice (now Chief Justice), and the said Robert M. Douglas, Associate Justice of the Supreme Court of North Carolina, with their concurring associate, constituting a majority of said Court, in disregard of their oaths of office, and in violation of the Constitution of North Carolina, and in disregard of the Public Laws of North Carolina, did, in the aforesaid controversy without action, cause to be issued from said Court the aforesaid peremptory mandamus writs, and under color of their offices as Associate Justices of the said Supreme Court, and in derogation of the Constitution and laws, did cause to be unlawfully drawn from the State Treasury of North Carolina the said sum of eight hundred and thirty-one and 15-100 dollars ($831,15), and by said wilful, unlawful and wrongful acts and misconduct in office, the said David M. Furches, Associate Justice (now Chief Justice), and the said Robet M. Douglas, Associate Justice, did then and there commit and were guilty of a high crime and misdemeanor in office.

The PRESIDENT: The Clerk will call the roll:

The Clerk thereupon calls the roll, and, upon the question being put, "How say you, are the respondents, David M. Furches and Robert M. Douglas, guilty or not guilty, as charged in the fifth article of impeachment?" the following Senators vote "Guilty:"

Senators Bray, Burroughs, Foy, Gudger, Justice, Lindsay, Miller of Pamlico, Morton, Scott, Smith. Travis, Vann, Ward, Warren, Webb and Wood—16.

And the following Senators voted "Not guilty:"

Senators Alexander, Arrington, Aycock, Broughton, Brown, Buchanan, Calvert, Candler, Crisp, Currie, Dula, Foushee, Glenn, Henderson, James, Leak, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Morrison, Pinnix, Robeson, Speight, Sugg, Stikeleather, Stringfield, Thomas and Woodard—34.

When the name of Senator JUSTICE is called, he says:

The fifth article of impeachment, in the beginning of the article, states the offence as a wilful violation of law, not an error of judgment; that part of the offence, in my opinion, must be proven as wilful and knowing and corrupt, or that there was an improper reason for deciding the case as they did—that of the office-holding cases. My view is that they are entitled to all reasonable doubt on that question; not only that they decided them wrong, but that they had an improper intent to decide them wrong. I have not come to that conclusion. This is stated in the paper I will file. I have not arrived at that conclusion at all. And the fact that in the latter part of this article of impeachment it is again charged that they caused the writ of mandamus to issue illegally, ought to cause me to vote "Guilty" upon that part; however, as I have already voted upon the latter part of it and given my reasons therefor, there is a doubt in my mind as to how I ought to vote. I want this statement to go down because I have definite views upon this point. If they were charged with the unlawful issue of the writ I would vote "guilty." But on the charge of an improper motive and wilfulness I can not vote guilty, because to my mind the motive is not proven beyond a reasonable doubt, and I scarcely know how to vote upon the question. Taking, however, the latter part

of the charge that the warrant was issued illegally and contrary to law, I vote "Guilty" upon that part of it.

When the name of Senator McNEILL was called, he said:

Mr. President:—Inheriting as I do a jealous regard for the rights of the people from either executive or judicial encroachment, and believing it absolutely essential to our political existence, and to the preservation of our system of civil government, that each and every department of our government should be maintained, defended and jealously guarded against every encroachment from any and every source, and having given every phase of this most important case my most earnest and careful attention in its every detail, against my personal desires, inclinations and sentiments for the respondents, as individuals, I find myself compelled by my oath, as a Senator, and juror in this case, taken in a most solemn manner, to render a verdict of guilty as to articles 1, 2, 3 and 4. This conclusion has been forced upon my convictions, by the direct evidence of the respondents themselves and further confirmed by all subsequent evidence. As to the fifth article, I find myself with a doubt as to their wilful violation of their oaths to defend the Constitution of our State, and I am glad, therefore, to be able to conscientiously give them the benefit of such doubt. Let me further say, Mr. President, that in arriving at these conclusions, I have been influenced by no possible feeling of partisanship, but that my decision would have been the same had the respondents been of my own kith and kin and of my own political household. I therefore vote on the fifth article, "Not guilty."

When the name of Senator MORRISON was called, he said:

Mr. President:—I do not wish it to be understood that I approve of the law as written by the Judges in these office-

holding cases, nor do I wish to be understood as approving their issuance of the writ of mandamus, which, in the other articles of impeachment, I have condemned, nor do I wish to be understood as approving their decision in *White v. Auditor,* in any respect. This article, Mr. President, is so drawn that I am confronted with much difficulty in voting upon it at all. It is so indefinite as to the office-holding cases I feel a difficulty in voting upon it at all. I do not approve their decision in *White v. Auditor,* and I am satisfied beyond a reasonable doubt that they were actuated by partisan motives in rendering the decision. In their other decisions I do not think that in some of them, which I can not now specify, that they wrote the law as I view it. But I am not satisfied that the Judges knew that they were not writing it correctly, and I believe in this they were entitled to the benefit of a doubt. I vote "Not guilty."

When the name of Senator MORTON was called, he said:

The fifth article of impeachment contains a number of charges, on some of which I think the respondents are not guilty. There are so many charges in this article upon which my honest convictions are that they are guilty, and as there are no means of separating the article by sections, I am compelled to vote "Guilty."

When the name of Senator TRAVIS was called, he said:

Mr. President:—I approach a vote on this article with some embarrassment. I have hoped that I could bring myself to vote for acquittal under it, because, as it charges partisanship, I feared that my different political faith might unconsciously affect me. But in reviewing the decisions of the respondents charged to be partisan, I find that they say in them that if the acts of the Legislature in the office-holding cases had been passed with fair and proper motives, they would have been constitutional. It follows, therefore, that in order to declare them unconstitutional, they must have

first found as a fact that the Legislature of 1899 passed them from improper motives. I was a member of that Legislature and voted for those acts. My intention in doing so was to give the State better officers and more efficient public service. I deem it as culpable to pass a law from improper motives as it is to construe one from improper motives. I therefore can not cast a vote which could be construed as an approval of these decisions, lest I convict myself.

In reviewing these decisions, I find that they are not only inconsistent with *Hoke v. Henderson,* on which they claim to be based, but are totally inconsistent with one another. In *Ward v. Elizabeth City* they hold that the taking of new territory into the corporate limits of that city, make it a different city, and operates to remove Ward from his office as City Attorney, while in McCall's case they hold that taking more territory (four counties) in the Western Criminal District, does not make that a new district, nor operate to remove the Republican Solicitor from office.

In Day's case they held that Day remained in his old office, at his old salary, with his old duties and powers, and preserved the Executive Board to perform the new duties. But in White's case they put him in the new office, with the new salary, new duties and enlarged powers, destroying the board entirely.

In the case of the Board of Agriculture and the Day case they held that the Legislature could increase the members of the Board of Directors to any number they saw fit, but in the case involving the control of the Atlantic and North Carolina Railroad they say that it can not. As fast as their own rulings obstructed their purposes they were brushed away. I vote "Guilty."

Senator WOODARD: The Constitution of North Carolina does not define the offences for which an officer can be impeached; that is done by the statute law and among other

provisions named by the statute is "corruption or other misconduct in office." The disjunctive conjunction is used as was used in the case of *State v. Leathers,* where the offence was defined by the Constitution. By the vote I have given I have not intended, nor do I wish to be understood as imputing to these respondents dishonesty or corruption in office in the sense of Lord Bacon's impeachment, taking a bribe. I can not agree that the law is as argued by the counsel for the respondents, that before I can reach a conclusion upon this article I must find a corrupt intent. It seems to me that the unlawful doing of a prohibited act carries with it a criminal intent. Why the Managers deemed it necessary in the fifth article to allege a specific intent I do not see, and as that is alleged in this article, I can not concur in that portion of the charge. My vote upon the previous articles sufficiently condemns the act charged in the latter part of the fifth article, and in order that I may be consistent and still, as a lawyer, not concurring in the opinions announced by the counsel for the respondents as to intent, and while I believe the action of the Court in issuing this peremptory mandamus was in disregard of the Constitution and of an express statute, I can not find from the testimony as a fact a specific intent as charged in the article, and I shall therefore vote "Not guilty."

The PRESIDENT: There being a failure of a concurrence of two-thirds of the Senators voting "Guilty," David M. Furches and Robert M. Douglas are acquitted on the fifth article of impeachment.

Senator HENDERSON thereupon tenders a judgment, stating that the same has been approved by the counsel for the Managers and the counsel for the respondents, and moves that the same be adopted:

The judgment is read by the Clerk as follows:

"IN THE SENATE OF NORTH CAROLINA—March 28, 1901.

"The State of North Carolina
against
"David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court.

"WHEREAS, The House of Representatives of the State of North Carolina did, on the 25th day of February, 1901, exhibit to the Senate, articles of impeachment, against David M. Furches, Chief Justice, and Robert M. Douglas, Associate Justice of the Supreme Court, and the said Senate, after a full hearing and impartial trial, has this day failed to convict the said respondents by a vote of two-thirds of the Senators present and voting on each of the said articles;

"Now, therefore, It is adjudged by the Senate of North Carolina, sitting as a Court of Impeachment, at their chamber, in the city of Raleigh, that the said David M. Furches and Robert M. Douglas are acquitted of the charges preferred against them in said articles.

"It is further ordered, That a copy of this judgment be enrolled and certified by the Lieutenant-Governor, as presiding officer, and the Principal Clerk of the Senate, and that such certified copy be deposited in the office of the Secretary of State."

The PRESIDENT: The Clerk will call the roll on the motion to adopt the judgment tendered by Senator Henderson.

The roll is called, and the judgment is adopted, ayes 50, noes none, as follows:

Those voting in the affirmative are: Senators Alexander, Arrington, Aycock, Bray, Broughton, Brown, Buchanan, Burroughs, Calvert, Candler, Crisp, Currie, Dula, Foushee, Foy, Glenn, Gudger, Henderson, James, Justice, Leak,

Lindsay, London, Long, Marshall, McAllister, McIntosh, McIntyre, McNeill, Michael, Miller of Caldwell, Miller of Pamlico, Morrison, Morton, Pinnix, Robeson, Scott, Smith, Speight, Stikeleather, Stringfield, Sugg, Thomas, Travis, Vann, Ward, Warren, Webb, Wood and Woodard—50.

The PRESIDENT thereupon announces its adoption as the judgment of the Court.

Mr. MORRISON: "I move that this Court adjourn *sine die.*"

The motion is adopted, and the Court adjourns *sine die.*

W. D. TURNER,
President of the Senate and Court of Impeachment.

A. J. MAXWELL,
Principal Clerk.

APPENDIX.

EXPLANATION OF VOTE.

(Filed by Senator WARREN, of Jones County.)

In arriving at my decision in this case, my mind was governed by the following facts, and the following provisions of law:

First. There was no specific appropriation for the payment of White's claim, as the Legislature of 1899 had expressly withdrawn same, and had made other provisions for the disposition of the Shell-Fish Fund.

Second. The two respondents ordered the issuance by the Clerk of a peremptory mandamus against the State Auditor and the State Treasurer to pay White's claim.

Third. That their decisions and conduct in office since 1899 convince me that the respondents were influenced by partisan considerations, and that said decisions and conduct were such as to bring the Legislature of 1899 into contempt and disrepute.

Fourth. The Legislature of 1899 had the undoubted right to remove White from office, to withdraw any appropriation made by a previous Legislature for the payment of his salary, and to make such provisions for the oyster industry as that growing and important industry demanded, and that the Legislature of 1899 did the above in express language.

Fifth. An officer's salary, especially this claim of White's, is a claim against the State.

Sixth. Article IV, sec. 9, of the Constitution of North Carolina, says that the Supreme Court shall have original

jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of an execution shall issue therein; they shall be reported to the next session of the General Assembly for its action."

Seventh. The two respondents knowingly and wilfully (their attention having been called to the provisions of law forbidding such a usurpation of power), caused the Clerk to issue a peremptory mandamus, compelling the payment of a claim which the Legislature of 1899 said should not be paid, and in open violation of the Constitution of North Carolina, Art. IV, sec. 9.

Eighth. There is not only no authority or precedent for the issuance of the writ of peremptory mandamus compelling payment of claim against the State, but there is a plain constitutional mandate against the same.

Ninth. I think in the issuance of the writ the respondents knowingly, wilfully and flagrantly violated the Constitution they had sworn to maintain, and for so doing they ought to suffer the consequences of their acts.

SPEECH OF W. A. GUTHRIE, OF COUNSEL FOR MANAGERS.

The following letter, published at request of Mr. Guthrie, will explain the brief report of his speech, as well as the "reportorial" style in which it appears:

"DURHAM, N. C., August 3, 1901.

"MR. A. J. MAXWELL, *Clerk, Rockingham, N. C.*

"DEAR SIR:—Replying to your request to furnish you for publication, among the impeachment proceedings in the trial of Chief Justice Furches and Associate Justice Douglas, a copy of my speech on that occasion, I regret to have to inform you of my inability to comply with your request, for the reason that I did not make any speech from manuscript, not even having notes of the line of argument I saw fit to pursue. I spoke only from mere memoranda of references to the authorities which I read and commented on, during the argument, and my speech was, therefore, *extempore*. You perhaps remember that I made the opening speech after the conclusion of the evidence; that I began to speak in the forenoon, and up to the noon recess of the Court had spoken about one hour; that when the Court convened in the afternoon, Senator Glenn, Senator Morton, and perhaps other Senators, expressed a desire to have all the speeches stenographically reported, and the attention of the Court was called to the fact that no stenographer had taken down the portion of my speech already delivered, thereupon the stenographer was sent for and took notes of the subsequent part of my speech, but since receiving your request I am informed that a legible copy of even the stenographer's notes can not be had. Under the circumstances, therefore, if the publication of even a synopsis of my speech is desirable, it can only be obtained by reference to the cotemporaneous newspaper reports contained in the Raleigh newspapers, which published pretty full reports of the trial from day to day.

"With regrets that I can not comply with your request, and at the same time requesting you to publish this letter among the proceedings, I am,

"Yours truly, WM. A. GUTHRIE."

MAJOR GUTHRIE'S SPEECH.

Major Guthrie began by congratulating the Senators that the trial had reached the point at which argument of counsel was to begin.

You met in this capitol the first month of the first year of a new century and your legislative acts and doings have now passed into history. But this is the most important matter that has, or will, come before you.

He reviewed the origin and progress of the impeachment proceedings, adding:

"In them there is laid on you the highest duty that a legislator can be called upon to perform. And, Senators, pausing for a moment upon the threshold of this argument, I want to quote to you from the opinion of one of the respondents, to show you the magnitude of the duty resting upon you. It is from *Green v. Owen*, 125 N. C., page 220, and was written by Judge Douglas:

" 'It is further urged by the defendants that this is only an $8 office and, therefore, beneath the notice of a court of justice. For this somewhat novel position the only authority to which we are cited is the maxim *de minimis non curat lex.* It may be an $8 office, but does it involve only an $8 principle? Where would the learned counsel draw the line? Eight dollars with board is equal to the monthly wages of many a farm hand, and can we say that that his month's labor is beneath our notice? Such proposition commends itself neither to our judgment or our conscience. We must stand by the principle as we have laid it down, and give to all alike its equal protection.'

Commenting upon this extract from Judge Douglas' opinion, Maj. Guthrie said:

"You are not trying a question of $831.15. You are trying a principle, and I join with him in saying, 'There is no little thing where a principle is involved.' This Court to which these respondents belong is a high court, the highest in the State, but yet it is not higher than the Constitution of the people."

Major Guthrie explained that in the discussion of the case he would have to go down to the fundamental principles of government and that in doing this he would perhaps be a little tedious, but his apology was that it was necessary, because many of the Senators were not lawyers, and had given but little time to the study of the principles of government. He added:

"Government is a growth, and no government is perfect. The Constitution is made by the people, and the people may change it whenever they see fit. It was only last August that a new section was

added to the Constitution, made necessary by existing conditions. What we now complain of is, that these Judges will not allow the Constitution to grow.

"The Supreme Court," he said, "ought to be the shield and protector of the people, the bulwark of their liberties, and not the trampler of the Constitution under foot, the disregarder of the laws."

He read Article I, sec. 8, of the State Constitution: "The Legislative, Executive and Supreme Judicial powers of the government ought to be forever separate and distinct from each other," and said:

"In the Constitution of every State in this Union, the legislative powers are first provided for, then the executive and lastly the judicial, and all of them say that these powers shall be forever kept separate. And that is what this Court of Impeachment is now called upon to do.

Just thirty years ago a high court of impeachment sat in this hall. And what for? To try the Chief Executive of the State, because he had encroached upon the rights and powers of the judiciary. He had defied the courts and, backed by military authority, had disregarded the sacred writ of *habeas corpus*. For this he was impeached and removed from office. That was a contest between the Executive and the judiciary. This is a contest between the legislative and judicial powers." At this point, Mr. Guthrie referred to the fact that about the time the State Constitution of 1868 was being framed and submitted to the people for adoption, Andrew Johnson, President of the United States was on trial for violating the Tenure of Office Act passed by Congress.

The speaker now discussed the case of *Marbury v. Madison*, decided by Chief Justice Marshall, and asked:

"What does Mr. Jefferson say about *Marbury v. Madison?* By reading it I can show you that there has been, is now, and can be, nothing new under the sun. This is an old case—this attempt of the judiciary to encroach upon the other departments of government. *Marbury v. Madison* was a case about office, and Mr. Jefferson wrote this concerning it:

" 'I observe that the case of *Marbury v. Madison* has been cited (in the trial of Aaron Burr), and I think it material to stop at the threshold the citing that case as authority and to have it denied to be law. * * * The Constitution shows that it did not intend to give the judiciary that control over the Executive. * * * On this construction I have hitherto acted; on this I shall ever act, and maintain it with the powers of the government, against any control which may be attempted by the Judges, in subversion of the independence of the Executive and the Senate within their peculiar

departments. * * * I have long wished for a proper occasion to have the gratuitous opinion of *Marbury v. Madison* brought before the public and denounced as not law. * * * I should be glad if, in noticing that case, you could take occasion to express the determination of the Executive that the doctrines of that case were given extra-judicially and against the law, and that their reverse will be the rule of action with the Executive.'

"On another occasion Mr. Jefferson referred to the 'twistifications in the case of Marbury' and called Chief Justice Marshall, who wrote it, a crafty Chief Justice, who sophisticates the law to his mind by the turn of his own reasoning.'

"That is the President of the United States speaking, and the representatives of the people in the House have laid it upon this body to say that the judiciary shall not encroach upon the powers of the people delegated to the Legislature.

"Senators, if you uphold the principle in *White v. Hill* and *White v. Auditor*, you must do so only on the principle of a miracle. Holy writ tells us that the Creator took some dust and out of it made a man and from that man He took a rib and made the best part of creation—a woman. These Judges have taken old man Theophilus White, a man they swear they never saw, and they have, by judicial construction, converted him into seven shell-fish commissioners." (Laughter.)

The speaker said the Constitution had defined the powers, duties and jurisdiction of each of the three departments, and he added:

"What we are trying to do in this Court of Impeachment is to find the landmarks of the Constitution and where the people have put the dividing line. It is not a question of $831.15. As Judge Douglas himself has said, it is a question of 'principle.' Have you forgotten so soon the campaign of 1898—have you so soon forgotten that the people were roused to fever heat from the mountains to the sea; that in some sections the tension was so strong as to bring about a conflict between the races? And what was it all about? Was it not about who should elect our officers? How jealous the people are of their liberties! They resent encroachments and you are called upon to run again the dividing line, which line is as plain as any dividing line of highway or street in a town, but which these men have attempted to wipe out."

Major Guthrie announced that he would not attack the doctrine of *Hoke v. Henderson*, except to say that "it may have been good law when it was rendered, in 1833, under the old Constitution of 1776. But since then, the government has grown and the Constitution has been changed. This fact the respondents seem to have overlooked, in their worship of *Hoke v. Henderson*."

"*Hoke v. Henderson!* How they ring the changes on it. They quote it on all occasions and seem to have slept with it under their pillows. Had they been as diligent in hunting up what the law now is as they have been diligent in stretching and stretching and stretching the doctrine of *Hoke v. Henderson* to suit their purposes they would not be here now." At this point in his argument Mr. Guthrie read and commented upon the changes made in the State Constitution since 1776, and the differences between the Constitution of 1776 and the present Constitution, which was adopted in 1868.

The speaker referred to the battle of Alamance fought for the people's liberty; the Declaration of Independence against the rule of kings; the Bill of Rights promulgated at Halifax.

He read the first section of that document: "That all political power is vested in and derived from the people only," and commenting on it, said:

"That was a new doctrine to the world. Heretofore the doctrine had been that all power was derived from the crown."

He compared the above with the Bill of Rights in our present Constitution, reading section 2, Article I: "That all political power is vested in, and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Touching it, he said:

"And here is something that points us to a conclusion: 'It is instituted solely for the good of the whole people.' Away then with the doctrine that it is instituted for the good of the office holders. This Court has reversed the spirit of the Constitution by an enlargement of the doctrine of *Hoke v. Henderson.* They would have you believe that 'public office is a private snap.' That is a modern expression, but the doctrine is a modern one, too."

He read on—"section 37, Art. I, of the present Constitution, which was inserted into the Constitution in 1868, some thirty-five years since the decision in *Hoke v. Henderson*, reads as follows: 'This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.' Commenting on this, the speaker said:

"There is not a word like that in the old Bill of Rights of the Constitution of 1776 under which *Hoke v. Henderson* is decided. I challenge them to show it."

The doctrine of *Hoke v. Henderson* was now discussed, and he said:

"The people in 1776 had been harassed by Governors—Tryon and that crowd—until they were tired of it. The Legislature was, therefore, given unlimited power, reserving nothing. The people in that

day were willing to trust their law-makers with all political power. That is not so now. You Senators come here now bringing behind you the reserved rights of the people—that which they have given to no other department of government, and which they lend to you only temporarily. They lend it to you as their servants, but when you undertake to tie up the hands of the people, and your successors for a longer time than your own term of office, you are violating that right. You can not say to them, this man shall go into office and remain five, ten or fifty years, as Judge Douglas and Judge Montgomery say you may. The people have not delegated to you such power; they never intended to delegate it. You may put a man in office, but if the people don't like him, they'll send a crowd here next time who'll say, 'Here, you get out.' "

Mr. Guthrie addressed the Court of Impeachment for about an hour in the forenoon. No stenographic report of his speech was taken down.

Afternoon Session.

At the opening of the afternoon session, Senator Glenn suggested that all speeches be taken down and printed. Lieutenant-Governor Turner said no arrangement had been made to print any of the speeches, except the two concluding ones. Senator Morton thought the stenographers should take down all the speeches, and that when the Legislature meets on the 3d of April, after the recess, provision could be made to publish all. No action was taken.

Major Guthrie resumed his argument. He said he appeared as an attorney, but he should lay down no proposition that did not meet his personal opinion and conviction.

"The matter of prime importance is to preserve the reserved rights of the people. The framers of the Constitution of 1776 were jealous of the rights of the people, but were willing fully to trust their representatives. The people of North Carolina would not adopt the United States Constitution until the rights of the people were guaranteed. In 1789, after a majority of States had adopted the Constitution, it was found that it needed amendments. Two of the ten amendments related to the reserved rights of the people. It was not until satisfied they would be adopted that North Carolina ratified the Constitution of the United States. Our forefathers were unwilling to give to the National Government any powers not enumerated. All other powers they determined should remain with the people. North Carolina people have always been jealous of their rights. Remembering the importance of those fundamental principles in 1868, the Republicans, in making a Constitution,

inserted a provision declaring that all powers not delegated in the State Constitution itself, remain with the people. He impressed upon Republican Senators that their party had incorporated that principle in the State Constitution made in 1868. If that provision had been in the Constitution of 1776, who will say Chief Justice Ruffin would have decided *Hoke v. Henderson* as he did? He challenged the opposition to show a single office-holding case decided by the present Supreme Court where this Court had referred to this constitutional provision. Since 1868, with one exception (*Nichols v. McKee*, decided in 1873), there has been no reference to this clause that leaves all power in the hands of the people, except what is delegated in the Constitution.

"We are not prosecuting these defendants for error of judgment, or mistake, but for a violation of the plain provision of the Constitution. They should not escape under the idea, 'I didn't go to do it.' If that is to prevail, suspend or repeal all the criminal law, turn the convicts loose and let society go to pieces. The Constitution is the organic law, the covenant that the people have made among themselves with each other. We do not deny the right of the Judges to declare a plain unconstitutional act to be in violation of the Constitution. When the Constitution is plain and express, the courts, as well as the people, must be made to respect it. Is it a small matter?" Ho read from an eminent New York lawyer,by name of Guthrie, author of "Guthrie on the 14th Amendment to the United States Constitution," to the effect that the violation of a constitutional right was great, even though in that particular instance it seemed slight. 'Admit the wedge ever so little and you pave the way for driving it home.' In this money-making age you hear it asked: 'What is the sense of making all this fuss about a little sum like $831.15? Why are you making so much fuss about a little thing?' If encroachments are allowed in the smallest particular, where will it end? If the courts can take $831.15 out of the State treasury, without warrant of law, why can they not empty the treasury? What is the use of a General Assembly at all, if the courts under '*in pari materia*,' which is another name for 'patchwork materials,' can take from and add to the laws to suit themselves? If they revise the laws, why not abolish the whole legislative business and let the Supreme Court run every department of government?

"Junius warned the people of England never to suffer an invasion of their Constitution. That warning is needed here in North Carolina. Nearly 2,000,000 of people are interested in this decision. You sit to run the line of division between the judicial and legislative departments of government. Each Senator has to take an oath

(different from the oath of any other officer) to support the Constitution and laws of the United States and the Constitution of North Carolina. He takes no oath on taking his seat in this General Assembly to support the laws of North Carolina. You are here to make laws, and you bring with you the reserved powers of the people. In one of the office-holding cases (*Ewart v. Jones*), Chief Justice Faircloth said: 'Under our form of government the sovereign power resides with the people and is exercised by their representatives in the General Assembly.' If these respondents had recognized this fact they would not have undone the will of the people, and would not now be here on trial. They dug up *Hoke v. Henderson*, decided in 1833, say it fits these times, contrary to the constitutional spirit, and put the office-holder's rights above the rights of the people. Wherever the Constitution fixes the term, of course the term provided by the Constitution stands; but not so as to offices created by statute. They concede that the Legislature that creates an office, can destroy it, but you can not get rid of an office under their decisions unless you abolish the office and all its duties. A proper construction of the Constitution is, that the Legislature can fill an office only for the same length of time as the term for which they were chosen. See what it would lead to if one Legislature could bind all future ones? One party gets in power; it fills every office with its own henchmen and gives them a term of five, ten, forty years, or for life. According to the decision of the court, if a new party comes into power, backed by a large majority of the people, its hands are tied for most legislation because it can not change any methods of electing or appointing officers already provided for, because they might disturb some $8 official, who has property in his office! A salary is so sacred, but the rights of the people are not sacred in the eyes of this court!

"We are about to have a new judicial catechism, which will read: 'The chief end of man is to hold office, and the chief end of an office is to get a salary.' When did the salary of an officer get to be so sacred?

"There is wisdom in the provision of the Constitution, Article I, sec. 28, that reads: 'For redress of grievances, amending and strengthening the laws, elections should be often held.' If one Legislature can bind subsequent ones and give tenures of office that may last for life, how can some grievances be redressed, and how can the laws be amended and strengthened?

"Were any of you here in 1895 or 1897, when men were clamoring to get in the penitentiary, not to wear stripes, but to get plunder, some of whom were no better than the men who wore stripes? In 1898 the people rose up in their majesty—said this government was

not created to put men into office, but for the good of the people, and they came to Raleigh to execute the will of the people. Were they permitted to do it? Look at the office-holding cases and see how their will was thwarted.

The Republican party in 1868 had possession of every department of State Government. If any Democrat was in office anywhere, he escaped somehow and was overlooked. In 1870 the Republicans were overthrown. The Democratic Legislature undertook to put their men in office. The question was then, Can the Legislature or the Governor appoint? The court said the Governor, because in express terms the Constitution of 1868 gave the Governor the right to appoint all officers and denied the rights of the Legislature to appoint or elect any officers. Since then, in 1875, the Constitutional Convention changed the Constitution by striking out all the provisions that forbade the Legislature to elect. *Clark v. Stanly*, decided in 1872, is no longer law, because the Constitutional Convention of 1875 changed the Constitution. In *Nichols v. McKee*, *Clark v. Stanly*, and like cases, based upon the Constitution, as it stood at the time of these decisions, you see no reference to *Hoke v. Henderson* in them.

"A public office is an agency of the State, is the definition of an office, according to Chief Justice Pearson. A public officer is an agent of the people, the people reserving the right to turn him out whenever they say so.

"If the court had adhered to the Constitution, as it now is, and had taken notice of the changes in the Constitution, there would have been no trouble. We contend that the Legislature that creates an office can abolish it.

"The question whether or not White's claim was a claim against the State is not a matter open to argument. The Constitution is so plain that any boy twelve years old could see that the Supreme Court could not order the Treasurer to pay out money when it is expressly provided that 'its decisions are merely recommendatory.' It goes on to say: 'No process in the nature of an execution shall issue thereon,' but 'they shall be reported to the next session of the General Assembly.' That is too plain to need argument. That provision was a barbed-wire fence put up to keep everybody not entitled by law to enter, out of the State treasury. But they say the Constitution does not mean what it says—an office-holder's salary is not a claim against the State. You may tell that to the marines, but old soldiers will not believe it. They say that this was put in to bar old claims growing out of the war. The Constitution wasn't made in a day. The Constitution adopted in 1868, Article IV, sec. 9, reads: 'The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely

recommendatory. No process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action.' In 1875 that clause (section 9) was not changed. Why was it put in? It was a wise provision, and now two Republican Judges are brought up for violating a Republican constitutional provision, which was wisely kept in by the Democratic Convention of 1875.

"The Supreme Court of the United States, in a case about paying an officer's salary (*U. S. v. Guthrie*), said that, unless fenced in, the treasury would be open to varying judgments of the courts. It eliminated a mandamus, except for purely ministerial functions; if the officer has any discretion, no writ can issue. That is the law of North Carolina. In *Boner v. Adams*, 65th N. C., it was held that the Treasurer and Auditor could not be sued in the same action or join them in a writ of mandamus. It was held that the Auditor is not a mere ministerial officer. He has many questions of discretion. He read extracts from the decision and compared it with the White case. In the White case the mandamus was issued against the Treasurer before the Auditor had exercised his discretion, and the case as to the Treasurer in *Boner v. Adams* for that cause was dismissed. Judge Reade said: 'If the claims were before us on ascertained facts, we might recommend it to the Legislature.' But the mandamus was refused!

"My! My! Suppose they had thought of the case of *Hoke v. Henderson? Bain v. Jenkins*, 66th N. C., decided when the Legislature had forbidden a warrant to be paid, application must be made to the Legislature, or a suit originating in the Supreme Court. Other like decisions were quoted.

"When Pearson was Chief Justice he did not think the Supreme Court carried the keys to the Treasury Department. Clement, of Ohio, made a contract with the State of North Carolina to furnish the steel doors for the Penitentiary cells. When the Democrats got in power they repealed the law under which this contract was made. Clement brought suit. The State said the Legislature had the power to repeal the law under which the contract was made, but the Court said the Legislature in repealing the law violated a contract. In order to ascertain Clement's damages, a jury trial was had before a jury in Wake County, and Clement got a verdict for $20,000 damages for breach of the contract. Chief Justice Pearson said that the State, according to the verdict, owed $20,000. Did he order mandamus? No. A copy of the proceedings and judgment was sent to the General Assembly. That's the way they did when Pearson was on the bench! They knew how much was due Clement, but did not think of going beyond 'the recommendatory' method prescribed in the Constitution.

"That was at a time when the Court would instruct its Clerk what to do; when a court would take responsibility when it should take responsibility. Major Guthrie then went at length into the methods by which claims against the State could be enforced. The entire machinery in The Code provides for ascertaining the amount in the Supreme Court, and it 'shall in all cases report the facts found, with their reasons, to the next General Assembly.' The law contemplates that the Supreme Court, instead of trying to usurp the functions of legislation, shall advise the Legislature, instead of taking a near cut, going through the barb-wire fence around the treasury, contrary to law, and taking out money illegally.

"But they say: 'We didn't order it.' Suppose you (addressing the Senators) had been Supreme Court Justices and you thought you had the right to order it paid, you would have directed the Clerk to issue the writ without trying to throw the responsibility upon the Clerk, who is 'nothing but the finger of the Court?' The Clerk was hunting for instructions. 'Japhet in Search of his Father' is an interesting book. Well, Japhet never searched with more perseverance for his father than Colonel Kenan, Clerk of the Supreme Court, sought instruction. He had a right to go to the Court and a right to expect their instruction. He is a lawyer of eminence and character. He had read the judgment, of course. Counsel say the judgment rendered in the spring already directed him to issue a mandamus. Is that so? Not at all. There is not one syllable in the judgment about a mandamus. There is no direction in the judgment for a mandamus. A clerk has to act upon the judgment, not the opinion handed down by the Court. The judgment of the Court is the climax of the opinion. Yet, driven from pillar to post, in shuffling and 'twistification,' when asked in October, they did not say they had already ordered a mandamus. It is well settled that a suit is always pending before a court until the judgment is satisfied.

" 'How to do it and how not to do it seems to be the maxim of the Court.' They didn't remand the case to Perquimans—they modified and entered judgment in the Supreme Court and there is no suggestion in it about issuing a mandamus writ. Their conduct is almost as bad as dating a deed back in order to get rid of a docketed judgment. They undertake to deny knowledge of the resolution of the Legislature of June 14th, when it was a matter of common knowledge.

"If they thought that the judgment authorized a mandamus writ, why didn't they say so when Harris asked for a writ? If that had been true, they would have said, when he made his application:

'That is superfluous. We have already made the order.' Instead of that they said: 'Have you given notice?' Then this dodging begins. They began to twist out of it. Harris telegraphed to Cook and notice is waived. They pass that bridge. 'Have you got the affidavit?' They now say their judgment directed the issue of mandamus writ, and yet twice gave other reasons why it could not be granted.

"Colonel Kenan knew he was handling edged tools, that he was travelling on thin ice. He then detailed the various conferences when Colonel Kenan was asked for instructions.

"Saturday morning Judge Clark writes his dissent. They are now face to face with the prohibition in the Constitution. Judge Clark demanded to put his dissent on the record. It was a respectful document. Many years ago Judge Addison, in Pennsylvania, was impeached and kicked out of office because he wouldn't allow his associate to charge the grand jury. But here Judge Clark was not allowed to file his protest. He would have been culpable if he had been silent. It was a time to be positive—to act, one way or the other.

"Think of a Supreme Court conducting itself as this one did. As a lawyer, I feel humiliated to know that we have a Supreme Court that dodges, refuses to take responsibility. Why did they not direct Colonel Kenan openly? But they say 'It wasn't before the Court,' while there was the application for a writ by Mr. Harris and request from Colonel Kenan for instruction. Isn't it clear it was before the Court? In the case of *Lord v. Beard*, Judge Bynum said: 'An action is pending until the plaintiff has obtained the fruit of his recovery.' This opinion has never been overruled. Repeatedly held that a case is always pending in court until the plaintiff is satisfied. Not until this day has the White judgment been marked 'satisfied' in the Supreme Court. It is still an open case, so far as the record shows.

"You are to say by your verdict whether you will send these men back to repeat such conduct. If you acquit them, the people are powerless. You have a great trust to perform. Impeachments are not so much to punish men as to remove unfit men from office."

Major Guthrie then took up the famous Louisiana case, *Jumel v. Louisiana*, 107 U. S., 711, upon which he relied. "After the war, the Legislature of Louisiana repudiated her bonds and agreed to pay sixty cents on the dollar. Taxes to pay the interest and provide a sinking fund on the sixty cent basis was levied and collected. Afterwards the Legislature of Louisiana repudiated the whole business and ordered the Treasurer not to pay the money, though it had been collected for that purpose and was in his hands, just as is claimed

in the White matter. A suit was brought against the State of Louisiana to compel payment to Jumel. The United States Supreme Court held that, though this money had been set apart—a specific appropriation to pay the interest—it could not be paid, the money being held by the State officers of Louisiana, and they can not be controlled by creditors, but hold the money, as they hold all moneys, for the people as their servants. Chief Justice Waite rendered the decision and gave as reason for it, that, in a legal way, the people had refused to pay the debt and they could not be forced, though the money was raised for the specific purpose. This case has been approved in quite a number of cases in the State and Federal courts since then. The Legislature of North Carolina, speaking for the people of North Carolina, ordered the Treasurer not to pay the White claim. Away with this idea that the State treasury holds money to pay the sacred salary of an officer, and for no other purpose! Suppose the Judges had hunted as earnestly for authority to get rid of this case as Judge Montgomery said they did for authorities to support their decision. They would not be on trial to-day."

The twelfth amendment to the Constitution to the United States forbidding a suit against a State by a citizen of another State to sue a State in the Federal Court was read and commented upon.

"In the White case, they say: 'We didn't intend to do anything wrong. If we erred at all, it was of the head. We did not know White. We had no political bias.' What are you going to do when Judges, in the teeth of the General Assembly, violate the Constitution when they know the Legislature wanted to change the whole method of survey and supervision of the oyster industry? The Supreme Court says we see you are trying to turn White out; we will attribute political motive to the Legislature; dig up *Hoke v. Henderson* and attempt to justify our action in the eyes of the people by calling upon that case as warrant for our action. In 1829 there was a slave owner in North Carolina, who whipped unmercifully a slave he had hired. The Court held that he did have the right to whip a slave. Judge Ruffin said it was repulsive to his personal feeling to decide that way, but to decide contrary would destroy society as constituted with slavery. Individually he would like to decide against whipping, but he followed the law. He wasn't hunting for precedent to carry out his individual views. (*State v. Mann*, 2d Devereux, page 263.) Ruffin said it would be criminal to avoid responsibility."

Major Guthrie drew a picture of Judge Ruffin following the law against his own humane inclinations. He then told what he thought Judge Ruffin would do if he could be called from the grave and return today. "If Chief Justice Ruffin should have the same case

to decide, now that slavery has been abolished, would he (Judge Ruffin) say that a master could whip a slave? He would say, 'Against my desire and inclinations, I then had so to decide. Things have now changed, and the Court must hold in accordance with the changed laws.' "

Then Major Guthrie drew analogy between that decision and the decision in *Hoke v. Henderson*. "The law laid down in that case, under the old Constitution, has become obsolete under the changed conditions that followed the adoption of the Constitution of 1868, readopted in 1875. The time was when property in a slave and in an office might exist and might be recognized in law. But in 1865 slavery was abolished and property in slaves can not exist, and all laws supporting slavery have fallen. In 1868 and in 1875 the people amended the Constitution and made all officers, except constitutional officers, subject to the control of the Legislature. The people reserved the power to make, alter or abolish legislative offices, and legislative officers, too, at the will of the people. The Legislature, representing the people, have no right to change the Constitution, but they have a right to put the public good alone above the property an office-holder has in an office. And yet the Supreme Court attempts to make a Supreme Court decision, rendered in 1833, above the Constitution and the law of the State to-day. If Judge Ruffin were on the bench, with the altered Constitution, he would no more uphold *Hoke v. Henderson* than he would seek to continue the law that a man can have property in slaves, or that he can whip his slaves. Each alike would lag superfluous on the stage after the law, the Constitution and the conditions had rendered them obsolete."

At this point in Mr. Guthrie's argument, the Court adjourned.

When the Court met yesterday morning 43 Senators answered to the roll-call.

Major Guthrie then resumed and concluded his argument.

In beginning his speech, Major Guthrie called attention to the irregularities in the record of *White v. Auditor*. In this connection he read from *Belmont v. Riley*, 71 N. C., 260, as follows:

"The summons must be made returnable to the regular term of the Superior Court; not having been so made returnable, the Judge at Chambers did not acquire jurisdiction and the action must be dismissed."

Major Guthrie, commenting on this decision, said:

"This case was thoroughly argued. For the plaintiff there appeared Reverdy Johnson, the great constitutional lawyer; Mr. Budd, of Philadelphia, and Richard Badger, who was of counsel for Holden in his impeachment trial, and Judge Bynum rendered the decision.

"This was as late as 1867, and everybody knows that the law in regard to mandamus has not been changed since."

The case of *Rogers v. Treasurer of Durham County*, 98 N. C., 129, was also cited and read from as follows:

"This action is to 'enforce a money demand,' and should have been brought to Superior Court in term. The summons was improperly returnable before the Judge at Chambers. He had no jurisdiction. The action must be dismissed for want of jurisdiction."

"In this White case the respondents were bound to take judicial notice that it was not heard at term time," continued Major Guthrie. "It was a case in which Judge Starbuck had no jurisdiction and the Court had notice of that fact. They were also put upon notice that this was an action for a money demand and could not be heard except at a term of the Court. If they had been as eager to find and do according to the law as they seem to have been to evade and defeat it, they would not be here to-day.

"Let me in conclusion say a word to you about motive. They plead to you that they had no wrong motives in this matter. Don't misunderstand the cause of the people in this case. These Judges are arraigned before this high Court for laying rude hands on the plain provisions of the law of the land. They are arraigned for violating a plain provision of the Constitution, which they had sworn to support."

The speaker said that, in talking about motives, he would cite an instance in Holy Writ where a man violated a plain mandate of Jehovah, and though he did it innocently, he had to pay the penalty of his life. To show this he read from the sixth chapter of Second Samuel:

"And when they came to Nachon's threshing floor, Uzzah put forth his hand to the ark of God, and took hold of it; for the oxen shook it. And the anger of the Lord was kindled against Uzzah; and God smote him there for his error, and there he died by the ark of God."

Commenting upon this passage, the speaker said:

"Uzzah, not being one of the priesthood, had laid his profane hand on the sacred ark of God; he did it innocently, and with only the good motive to steady the ark of the covenant, but that was a sin that Jehovah could not forgive, and He drew the sword of justice and smote him. Shall mortal man be more just than God? And that, too, when this offence was wilfully and knowingly committed. When these men have knowingly and palpably violated the law and the Constitution, shall we say they may go back again and administer justice?"

Major Guthrie called attention to the fact that the Judges had five months after the argument of the case in which to make up their minds and render a decision, and added:

"And having decided, they threw papers at Judge Clark, because he would not agree with them, and wanted to go on record as saying so. Great God, what a spectacle in the highest Court of the land! Angered at him because he would not go with them—mad when he tried to reason with them; and finally when he said, 'Well, if you will do this thing, let me enter my protest against it,' they replied in hot anger: 'You shall do nothing of the kind.'

"Senators, I have done, and so far as my part in the argument of this case in behalf of the people is concerned, I leave the determination of this most important matter with you."

SPEECH OF C. M. BUSBEE, OF COUNSEL FOR MANAGERS.

Mr. Busbee requested the publication of the following letter of explanation:

RALEIGH, N. C., April 16, 1901.

MY DEAR SIR:—I am in receipt of your letter, asking me to furnish you a copy of my argument in full in the impeachment trial, for publication in the printed report of the trial. I greatly regret that it is not possible for me to do so. My argument was not written out; it was made from notes and a memorandum of authorities, and some of the notes I did not preserve. Whatever merit it may have possessed was in large measure due to the stress and inspiration of the occasion. It is simply impossible for me to reproduce it now.

If I had known at the time that the arguments were to be published, I would have had it reported in full by a stenographer, but at the time a resolution had been passed by the Senate providing that only the opening and closing arguments should be published with the proceedings of the trial. It was not until after the trial, and when it had passed beyond my power to write out my argument, that the Legislature, at its adjourned session, determined to publish all the arguments.

I send you a copy of the report of the argument, as appeared in the newspapers, which is all that I can do.

Yours very truly, C. M. BUSBEE.

MR. BUSBEE'S SPEECH.

Mr. Chas. M. Busbee now began the second speech for the prosecution. He referred to the importance of the case and said:

"Upon you rests a supreme duty, for you are the triers of the law and the facts. The Constitution of this State is at issue in this trial —whether it is binding alone upon the legislative and executive departments, or whether the judiciary also is included in its operation and requirements.

"I regretted, Senators, to hear from the lips of counsel (Captain Cooke) words that I thought exceedingly unfair and inappropriate. He proceeded to assail the gentlemen who brought these Judges here for trial. He said that the Board of Managers were trying to degrade the high priests. He said that they were standing for tyranny,

and that they were trying to degrade his clients. I regret these epithets. Speaking for the Managers, and yet not at their request, I desire to say a word in their behalf. They need not my defense, but I only speak that which all men do know when I say that no men ever brought a case into Court with higher purposes or cleaner hands. Men of the highest character, all of them, they have the respect and confidence of the people of their State, in whose name they bring these proceedings before you."

The speaker also spoke of Captain Cooke's reference to "influences at work in the Senate," saying, "I know of no such influences and I do not believe there is a Senator here that could be swayed by any sort of influences, either for or against the defendants."

Mr. Busbee contended that this case hinged entirely on the issuance of the writ of mandamus.

"If it was issued in defiance of law and contrary to the Constitution, then these respondents are guilty. If it was issued in accordance with the law and the Constitution, then they must stand justified before you and the people. No considerations of prejudice or pity can influence you in coming to your conclusion."

Touching the independence of the judiciary and charges on which Judges may be impeached, Mr. Busbee read a number of authorities. He added:

"You'll find, Senators, that it is held by all the authorities that the impeachment need not be for an indictable offense, but for any misconduct in office. It need not be a violation of any positive law, but is primarily directed to official misconduct.

"The purpose of impeachment is not punishment, it is simply to prevent. Prevent what? A repetition of the offense. The law provides for the removal of the offender and having done that, the Court can add, if it sees fit so to do, that other penalty—an inhibition from ever again holding office in the State.

"Before I get through, Senators, I shall show to you that part of the offense of these Judges has been a re-writing of portions of the legislation of 1899, and a bold, pure usurpation of the powers of a co-ordinate branch of the government."

At this point Mr. Busbee called attention to what he said was a remarkable omission in the answer of the respondents. This was the Judge's oath "to maintain and defend the Constitution." The other oath, "to do equal and exact justice" to all men, is set out in the answer.

"But," said Mr. Busbee, "it is for the violation of the other oath that these proceedings are brought, and it strikes me, Senators, as very strange that this particular oath of all should have been omitted and the other inserted."

Mr. Busbee now read the three sections of the Constitution alleged to have been violated by the Judges. Commenting on these, he said:

"They have not kept the three departments of government separate and distinct.

"They have assumed jurisdiction when they had no jurisdiction, and have issued a process in the nature of an execution.

"They have forced the Public Treasurer to pay money when there was no law on the statute books authorizing him so to do."

Mr. Busbee now discussed the nature of a mandamus and when and how it may be issued under the law.

"A mandamus can be issued to a State officer, not to make him pay the debt, but to compel him to obey the law."

The speaker defined "claims against the State" as contemplated by the Constitution, and said there was no difference between a debt due by the State for salary and that due on a contract for work. "Both are claims against the State."

He here read from the decision in *Blount v. Simmons*, 119 N. C.

"It is well established that a suit against an officer is a suit against the State, and no suit can be tolerated against a State officer unless it be to make him comply with a statute of the Legislature."

"Now, did these respondents violate the Constitution?

"Did they issue the mandamus? They did; they don't deny it.

"Was it a claim against the State? It was, and was in violation of Art. IV, sec. 9, and Art. XIV, sec. 3, of the Constitution."

Bain v. Jenkins, 66 N. C., 356, was cited to show the evil of extending such jurisdiction.

"Why, Senators, if the Supreme Court has such jurisdiction as it exercised in *White v Auditor*, the Superior Court has the same jurisdiction, and if this Court of Impeachment shall endorse this action of these Judges the decision will rise again to plague you. Hereafter a writ from the lower courts will do the same dangerous work that this writ from the higher Court has done.

"Do you not realize how far-reaching may be your decision here?

"So much for the first article. The second article says the Supreme Court usurped legislative power and authority."

Referring to the "Oyster Laws" of 1897 and 1899, Mr. Busbee said "around these acts the storm of battle rages." He read them, and called attention to the language of the Supreme Court in construing them.

"The Judges in their decision studiously avoid saying that White was authorized to render the services under the provisions of this act (chapter 21, 1899). And why? Because they could not say it. But instead, they say he rendered the services under the act. When they said that they usurped legislative power, they wrote in the act words that the Legislature did not put there.

"And again, Senators, the Judges usurped legislative power when they prescribed a different method for the certification of bills."

He explained the method for certification provided by the Legislature—that the bills shall be approved by the secretary of the board and countersigned by the chairman.

"But the Court abolished the board—had to do it to put White in.

"Well, of course there could then be no 'secretary of the board'—there being no board there could be no 'secretary to the board.' But White appoints one of his deputies as his secretary and he approves the bills, and White countersigns them. And how does he sign them—not as 'chairman of the board,' as the law provided, but he signs them sometimes as 'C. I. S. F. I.' (Chief Inspector of the Shell-Fish Industry), and at other times simply as 'chairman.' Chairman of what? No board was left. Chairman of nothing. The title is simply left to show that after the Court had amended and re-written the act, they left it in such condition that it could not be carried out."

Mr. Busbee now referred to the resolution of inquiry passed at the special session of the Legislature in June, and to Judge Clark's dissenting opinion and protest, and said:

"These respondents had plain, definite, precise information as to the intent of the Legislature. And yet, these respondents went ahead and said they would do this thing, no matter what might be the consequences. Now, Senators, it is with you to say whether you endorse such action or not.

"So I will say, and the facts bear me out, that these defendants did issue this mandamus in defiance of the will of the Legislature, and they did it knowingly."

At this point Mr. Busbee returned to a discussion of proceedings for mandamus and contended that failure to verify the complaint in *White v. Auditor* was fatal. He cited *Belmont v. Riley*, 71 N. C., 260, and *Rogers v. Jenkins*, 98 N. C., 129.

"I charge nothing against the attorneys in that case, but I charge the State Treasurer with a neglect of his duty in regard to the moneys in his keeping. And these respondents knew that this proceeding was not regularly constituted. They knew that they did not have jurisdiction even to pass upon the claim, much less to issue this great writ to unbar the doors of the treasury."

Mr. Busbee read the judgment in *White v. Auditor*, and argued that there was not one word in it that directed the writ to issue. He asked:

"I ask you, Senators, isn't it misconduct in office for a Judge to order the Clerk to issue a writ, or advise him to do it—a writ that unlocks the doors of the treasury and takes out money, when the judgment on which it is issued does not justify it? They can't get their authority to issue it from the judgment of Starbuck, because if that were so, the writ would have been issued from the Superior

Court of Wake County. The only authority they can have is from the fact of this judgment in *White v. Auditor*, and it was on this it was issued.

"When you come down to the cold, hard facts, you can't get around it—these respondents have issued this great writ without authority and in the very teeth of the law."

He declared that the whole case "simply reeks with irregularities." He asked the other side to examine the decision and the judgment and find anything "to authorize the Auditor to pay this claimant at his own sweet will."

Here Mr. Busbee read a long list of North Carolina authorities in regard to when and how a mandamus may be issued. One of these was *Burton v. Furman*, 115 N. C., which holds that "no mandamus will lie to compel the Treasurer to pay, except upon his refusal to honor the warrant."

"The Court had no right to say that the Treasurer must pay such claims as the Auditor might say are due. The law of mandamus in North Carolina says a peremptory mandamus only lies for a specific and definite amount of money."

On this point *Bank v. Harris*, 84 N. C., 210, and *McLendon v. Commissioners*, 71 N. C., 83, were read; also, *Bailey v. Caldwell*, 68 N. C., 472, in which it is held that no mandamus ever lies against an officer of the State unless it is to do a specific act which the Legislature has ordered him to do. No mandamus has ever issued against the Treasurer, except to make him obey the declared will of the Legislature."

"Now, Senators, I come to the question of intent.

"A man's intent is judged by his acts. The intent is a necessary ingredient of the act. No man can be heard to plead that he did not intend to do that which he has deliberately done."

A number of authorities on the question of intent were read. Among them were *State v. Hatch*, 116 N. C., 1003, and *State v. McLean*, 121 N. C., 594. In the last-named case the two impeached Judges were on the bench, and Judge Montgomery wrote the opinion, holding that it is "only necessary to show that they intended to do that thing which they did."

"I can't say when I violate the law that I didn't intend to do the act. So if you shall find that these respondents ordered the Clerk to issue the writ or advised him to issue it, and that writ violated the law, then they can't be heard to say they didn't intend to violate the law. No living man can escape that logic.

"Again, in *State v. McBrayer*, 98 N. C., 619, we find this language: 'When the act is forbidden by statute, the doing of the act implies the guilty intent.'"

Mr. Busbee argued that it was impossible for the respondents to examine into the question of issuing the mandamus without refusing to issue it.

"They couldn't have considered it and have issued it. And why did they issue it? Because they had determined to issue it at all cost."

Touching the refusal of the Court to allow Judge Clark to file his dissent, Mr. Busbee said:

"No more could they allow that. They knew they were doing wrong, and they didn't want it to be put on record. The act of the Court is what gives its opinions vitality. What the Court does is much more important than what the Judge thinks.

"Again, they refused to consider the Legislature's resolution of inquiry, and that again shows their intent.

"Judge Douglas, it is in evidence, told Mr. Harris out of Court that he'd get his money. What business had a Judge telling an attorney he'd get his money before the writ is issued?

"These things show the ear-marks of actual intent. Did they issue the mandamus? They don't deny it now, and this morning out of the mouth of counsel they assumed responsibility for it.

"It isn't these defendants alone that are upon trial. The organic law of the land is upon trial. The Constitution of the State is upon trial. Are you going to say that it can be disregarded by the highest Court we have?

"Are you going to allow this new principle to be incorporated in our fundamental principles of government? Have you thought where it leads? There have been Legislatures that would have paid $5,000,000 of worthless bonds; there have been Judges that would have paid them. When once you open the flood-gates, you know not where the tide will bear you. When a great principle has been departed from, or a new principle announced, the time to test it is then.

"Let this Court of Impeachment say: 'Now and forever, here and always, this Constitution shall be preserved unbroken as the law of the land.'"

SPEECH OF LINDSAY PATTERSON, OF COUNSEL FOR THE RESPONDENTS.

Mr. PRESIDENT AND SENATORS:—This drama is drawing to a close. Whatever may be the result of this trial, it will prove to be a tragedy to these respondents and to the State. No man can pass through the ordeal to which they are being subjected without regarding it as one of the tragic events of his life. I have had the honor of their friendship for nearly twenty years. They are here to-day—the one scarcely past middle life, with many years, as we may hope, of life and usefulness before him; the other possessing all that should accompany old age; honor, love, obedience, troops of friends. But their counsel believe that they, in this cause, are guarding more than the fate of two citizens of the State. We believe that, under the evidence produced in this case, and under the law of the land, we, and not the honorable Managers, are standing for the State, her institutions and her people.

I do not, in the least, impugn the motives of the honorable Managers in the prosecution of this impeachment, for they are all honorable men, and some of them are my personal friends; but it is to be regretted that before they launched this prosecution, they had not heeded the words of a statesman of the 15th century: "Let no one, who begins an innovation in the State, think that he can direct it according to his will, or stop it at his pleasure."

What is the real question here at issue? These respondents are not charged with the high crimes and misdemeanors enumerated in The Code of North Carolina as impeachable offences; not with bribery, nor with drunkenness in a public place, nor with incompetency, nor with inability. Neither are they now charged in the argument of counsel with the wilful violation of the Constitution of the State; but only with technical violations of the Constitution and laws of the State, growing out of mere errors of judgment. And it is solemnly declared that such technical violations constitute such high crimes and misdemeanors, for which judicial officers should be removed from office and disgraced before the eyes of their countrymen.

The honorable chairman has declared to you that an impeachable offense consists not necessarily in a corrupt motive in the conduct of public officers; but that all officials, whose conduct in office may prove prejudicial or dangerous to the public interest, should be re-

moved, by the process of impeachment, and that it is merely a question of purging the public service of such officials.

He has told you that the doctrine of *Hoke v. Henderson*, even when kept within reasonable bounds, is dangerous. The friends of the great Chief Justice who delivered that opinion, and those of his eminent associates, must rejoice that the honorable Managers saw the light of day many years after this noted judgment was rendered; for, according to the views now put forth, Ruffin and Gaston and Daniel should all have been impeached as men dangerous to the welfare of the State. This idea, that a mere error of judgment on the part of a judicial officer, constitutes an impeachable offense is surely a novel one, and one never dreamed of by the able jurists who have from time to time adorned our highest judicial stations. The Judges of the Supreme Court of North Carolina take an oath to observe and defend the Constitution of the United States, as well as the Constitution of this State, and a technical violation of the one must be regarded as seriously as that of the other. In 1886, in the case of *The State v. Long*, the Supreme Court of North Carolina declared that the drummer's tax law was not in conflict with the commerce clause of the Constitution of the United States. At that very time Justice Bradley of the Supreme Court of the United States was writing an opinion in the case of Robbins against the Taxing District of Shelby County, declaring, in effect, that said tax was an infringement upon that clause, and was void. Three years afterwards, in the case of *The State v. Bracco*, the Supreme Court of North Carolina reversed the Long case, citing *Robbins v. Shelby County*, and held the tax utterly void. Thus, we have indisputable evidence, furnished by the Judges themselves, that the Constitution of the United States had been violated by them in *The State v. Long*, and, according to the views of this prosecution, that they had violated their oaths of office and deserved impeachment at the hands of the General Assembly of North Carolina. In *Edwards v. Kearzey* our Supreme Court held that the homestead, as allowed under the Constitution of 1868, was enforceable against debts of the homesteader contracted prior to the adoption of that Constitution. An appeal was taken to the Supreme Court of the United States where the decision of the State Court was reversed, as being in violation of the contract clause of the Federal Constitution. This opinion of the Federal Supreme Court was published, by the direction of the State Court in the 79 North Carolina Reports, where it will, for all time, furnish unmistakable evidence of the error of judgment committed by our Court. Could the Judges who ordered it so printed have conceived, for a moment, that they were furnishing to the General Assembly testimony upon which they could have been convicted of high crimes and misde-

meanors? The propositions enunciated by the honorable Managers and their counsel are indeed novel and startling—propositions never before advanced in any court of the State.

I desire to call the attention of the Senators to some peculiar features of this prosecution. It may be assumed that the Managers believed that the respondents could be found guilty upon any one of the five articles of impeachment. Justice Montgomery concurred in every opinion which is declared to be the basis of the charges embodied in Article V. He concurred with the majority of the Court in holding, in *White v. Auditor*, that White's claim was not a claim against the State, within the meaning of section 9 of Art. IV, of the Constitution, and he agreed further that, if the method of drawing the vouchers had not become an impossible one, the writ of mandamus could properly be issued against the Auditor of the State for the payment of the salary of an officer of the State. Judge Starbuck ordered the mandamus to issue in *White v. Auditor*, and, if no appeal had been taken, the writ of mandamus would have been enforced against the Auditor and Treasurer. If these respondents be guilty, Judges Montgomery and Starbuck are equally so. Not that we ask for their impeachment; they are honorable gentlemen and upright Judges, and no more deserve impeachment than these respondents do; but for some mysterious reason, which I will not attempt to divine, the grand Court of Inquiry of the State has chosen to condemn these respondents, and to prefer no charges against Judges Montgomery and Starbuck. Has such a spectacle ever been furnished by any other grand jury in the State for the gaze of the world? You are asked to cause the Goddess of Justice to withdraw the folds from before her eyes, to throw away her balance and her sword, and, standing in this temple and beholding four men, alike innocent or alike guilty, to condemn two of them and set the others free.

Nothing has been allowed to stand before the temper of this prosecution. Of course the respondents have been fiercely denounced; but no one, however lofty his position, has been spared. "Carthage must be destroyed," no matter whose name and character are buried in the ruins. The sanctity of the grave has been invaded. The late Chief Justice Faircloth, so recently deceased, is charged in the articles with conspiring with the respondents in a wilful attempt to overturn the Constitution and laws of the State; to encroach upon the rights and prerogatives of the General Assembly; to bring it into disrepute and contempt, and to unlawfully withdraw money from the public treasury.

Major Guthrie, in opening his speech for the prosecution, made an assault upon the author of the decision of *Marbury v. Madison*, at whose death Justice Story, his associate on the bench for twenty-four years, spoke these words:

"The community have sustained a severe loss in the departure of this great and good man, who was ripe in years and full of honors. His genius, his learning and his virtues have conferred an imperishable glory on his country, whose liberties he fought to secure, and whose institutions he labored to perpetuate. He was a patriot and statesman of spotless integrity and consummate wisdom. The science of jurisprudence will forever acknowledge him as one of its greatest benefactors. The Constitution of the United States owes as much to him as to any single mind for the foundations on which it rests, and the expositions by which it is to be maintained. But, above all, he was the ornament of human nature itself, in the beautiful illustrations which his life constantly presented of its most attractive graces and most elevated attributes. We who have been the witnesses and companions of his judicial labors can not but feel the desolation which has visited us. Our consolation is, that he is now beyond the reach of human infirmity, and (as we trust) in the possession of the rewards of a blessed immortality. This hall will never again be honored by his presence. But so long as it shall remain devoted to the administration of public justice, so long will it preserve the best records of his fame. He who in future ages shall here seek for his monument, need but look around him and before him. The voices of the eloquent and learned, which will here pronounce his name, will never fail to breathe forth at the same time his most affecting praise."

Such was the contemporaneous opinion of this matchless Judge and exalted personage, and a century after the decision of *Marbury v. Madison*, which is now so fiercely assailed, was rendered, the bench and the bar of America knelt at his shrine to pay him reverence. And it remained for the counsel for the prosecution, while engaged in the business of wholesale denunciation, to utter words of detraction against the spotless name of John Marshall.

I shall not, at any length, discuss the doctrine of *Hoke v. Henderson*, but I must notice one or two of the arguments advanced by Major Guthrie and Mr. Busbee. The former contended that *Hoke v. Henderson* might have been sound law in 1833, but that it could not be the law at present, for that the Constitution of 1868, by section 37, Art. I, reserved all powers, not therein delegated, to the people; and that, if such a clause had been placed in the Constitution of 1776, the Court could not have possibly enunciated the doctrines found in *Hoke v. Henderson*. If the powers, not delegated in the Constitution of 1776, did not remain with the people, with whom did they remain? And how could that Constitution, or any subsequent Constitution, have been amended or abrogated, unless all powers, not therein delegated, had remained with the sovereign people? All powers, not delegated in the Constitutions that pre-

ceded that of 1868, remained with the people as effectually as they do under the Constitution of 1868, and this clause of the Constitution of 1868 has not the remotest connection with the principles upon which the decision of *Hoke v. Henderson* was founded. The opinion of the Court in that case was based upon that section of the Bill of Rights of 1776, which has been incorporated in the present Constitution in the exact words of those of the Bill of Rights, and which reads as follows: "No person ought to be taken, imprisoned or disseized of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty or property, but by the law of the land." And in *Hoke v. Henderson*, and all the subsequent cases on the subject the Court has held that an office is such a property as is protected by the above constitutional provision. Major Guthrie also asserted that on account of this reservation to the people of all powers not delegated, it necessarily followed that no Legislature had the power to appoint any person to any office for a term exceeding the life of the Legislature. This, indeed, is a novel proposition and one which no Legislature, since the adoption of this constitutional provision, has acted upon or in any way observed. You, yourselves, have violated it at this session by providing for the appointment by the Governor of the State's Prison Directors for terms of four years, and by your electing some twenty Trustees of the University for terms of eight years. If Major Guthrie's view of the present Constitution be correct, you, yourselves, have violated it, and, according to the contentions of the prosecution, are impeachable for high crimes and misdemeanors in office. And the honorable Managers, if truly patriotic and consistent, should immediately demand that you resolve yourselves into a high court for your own impeachment.

The counsel advanced another argument that was a little amusing. They solemnly aver, in the fifth article of impeachment, that these respondents have attempted to curtail the power of the General Assembly, and to bring it into disrepute and contempt. And upon the trial they have attempted to establish this charge by showing, out of the mouths of the respondents themselves, that the General Assembly has, under the principles of *Hoke v. Henderson* and of the subsequent cases, the power to make appointments to office for terms of fifty years, and that the executive and judicial departments are powerless to interfere. They charge that the effect of the decisions rendered by these respondents in what are known as the "office-holding cases," is to encroach upon and weaken the powers of the General Assembly, and then they proceed to make good their charge by showing that the construction given to the Constitution by these respondents confers on the General Assembly the power to perpetuate its appointees in office—a power which

no subsequent Assembly can abridge, and over which the executive and judicial departments have no control!

Article I of the impeachment alleges that these respondents have wilfully violated section 8 of Art. I of the Constitution, which provides as follows:

"The Legislative, Executive and Supreme Judicial powers of the government ought to be forever separate and distinct from each other."

What could be a more flagrant violation of this section than this proceeding? Mr. Busbee laid down the true proposition involved in this case. He told you that if you should construe the claim of Theophilus White to be not a claim against the State, within the meaning of Art. IV, sec. 9, of the Constitution, your construction might rise up in after years to plague you. In other words, he declared that you, constituting the upper branch of the Legislative Department, are to perform judicial functions—to usurp the powers of the Supreme Judicial Department of the State, and to violate the explicit provisions of section 8 of Art. I by construing section 9 of Art IV; so that henceforth in North Carolina the Senate will not only aid in making the laws, but will sit as a high court of appeals in their interpretation! For three hundred years the British House of Lords has exercised both legislative and judicial functions; but such a combination of powers has found no place in our government, and the purpose, avowed here to-day, to engraft it upon the jurisprudence of our State, is without a parallel in the history of the Commonwealth. This proceeding, as it is now directed, to have you to construe the Constitution and laws of the State, is a usurpation of the rights of the judiciary. And every one who has yet spoken for the prosecution has been so impressed with this fact that he has been constrained to deny that this movement involves an attack upon the rights and independence of the bench. But such it is, and such it will be regarded in future years.

Some of the noblest examples of manly independence and courageous conduct, in the history of England, are to be found in the fearless discharge of official duties by those great Judges who have refused to be driven by the king or moved by the clamor and tumult of the mob. Among the most conspicuous and shining was the one made by Lord Coke, when, in obedience to a summons, he appeared before his sovereign, and defiantly declined to obey his commands, declaring that his conduct would ever be such as should become a Judge.

This is a criminal proceeding, and you must try these defendants by the rules that govern criminal trials. Before you can arrive at their conviction, you must be convinced of their guilt beyond a reasonable doubt.

"An impeachment proceeding against a public officer being criminal in its nature, the respondent can not be judged guilty, as charged, until his guilt is established beyond a reasonable doubt." *State v. Tally*, 102 Ala., 25; 15 Am. and Eng. Enc., 2d Ed., 1071.

As I have before stated, I shall not attempt to discuss the office-holding cases, but will direct your attention to the charges contained in the first, second and third articles of impeachment, and, in doing so, will ask you to consider these three questions:

I. Did these respondents wilfully violate the laws and Constitution of North Carolina, as therein alleged?

II. Did they ignorantly violate them, and if so, what is the effect of such violation?

III. Did they violate them at all?

I. Upon the question of wilfulness, three men, Chief Justice Furches, Justices Douglas and Montgomery, have testified; and all three have explicitly denied that these defendants knowingly or wilfully violated the Constitution and laws of their State. A fourth witness, Justice Clark, who has had the fullest opportunity for the last four years to scrutinize the judicial conduct of these respondents, and to discover the motives prompting their actions, was brought, as a witness, before you by the counsel for the prosecution; but not one word did they ask him as to the motives, as he saw them, that controlled these defendants in rendering the decisions complained of. You would not, Senators, convict, upon this testimony, the humblest citizen of the State charged with the commission of the slightest misdemeanor. What jury would convict any man charged with murder, when three of the four eye-witnesses swore to his innocence, and the fourth, although put upon the stand, failed to testify whether or not the defendant committed the crime? I contend that, upon the question of wilful violation, there is a total absence of proof, and I respectfully submit that you must so find. Judge Clark was in almost daily association with these Judges—he was present at the conferences when all these so-called political cases were discussed, and yet he has not given evidence concerning a single act done or word said, by either of the defendants, which furnishes the slightest proof that they were influenced, in their judicial duties by any considerations, save those that should control a Judge in his search for the law and the truth. If you should convict the defendants of the charges made in these three articles, I must believe that it will be done without legal evidence to sustain it.

II. But what would be the legal effect upon the innocence or guilt of these gentlemen, if they have broken the Constitution and disregarded the laws through ignorance? A century ago the Judges in Rhode Island and Ohio were impeached for errors of judgment,

but were acquitted; and since that time, so far as I am aware, the proceeding of impeachment has not been set in motion to disgrace judicial officers for mere errors in judgment, and it nas never been heard of before in our State.

If a decision by a Judge against the law, as it may finally be determined, be an impeachable offense, then every Superior Court Judge whose judgment has been reversed by the Supreme bench, has been guilty of high crimes and misdemeanors in office, and every member of any General Assembly who has voted for a law which has afterwards been declared unconstitutional by the courts has been alike guilty. Lord Erskine, England's greatest advocate, declared that an impeachment for error in judgment was wholly contrary to the spirit of English jurisprudence. In his great speech in defence of Stockdale, he said:

"So much for the first part of the sentence, which, regarding Mr. Pitt only, is foreign to our purpose; and as to the last part of it, which imputes the sentiments of the minister to the majority that followed him with their votes on the question, that appears to me to be giving handsome credit to the majority for having voted from conviction and not from courtesy to the minister. To have supposed otherwise, I dare not say, would have been a more natural libel, but it would certainly have been a greater one. The sum and substance, therefore, of the paragraph, is only this: That an impeachment for error in judgment is not consistent with the theory or the practice of the English government. So say I. I say, without reserve, speaking merely in the abstract, and not meaning to decide upon the merits of Mr. Hastings' cause, that an impeachment for an error in judgment is contrary to the whole spirit of English criminal justice, which, though not binding on the House of Commons, ought to be a guide to its proceedings. I say that the extraordinary jurisdiction of impeachment ought never to be assumed to expose error, or to scourge misfortune, but to uphold a terrible example to corruption and wilful abuse of authority by extra legal pains. If public men are always punished with due severity, when the source of their misconduct appears to have been selfishly corrupt and criminal, the public can never suffer when their errors are treated with gentleness. From such protection to the magistrate, no man can think lightly of the charge of magistracy itself, when he sees, by the language of the saving judgment, that the only title to it is an honest and zealous intention. If at this moment, gentlemen, or indeed in any other in the whole course of our history, the people of England were to call upon every man in this impeaching House of Commons, who had given his voice on public questions, or acted in authority, civil or military, to answer for the issues of our councils and our wars, and if honest single

intentions for the public service were refused as answers to impeachment, we should have many relations to mourn for and many friends to deplore. For my own part, gentlemen, I feel, I hope, for my country as much as any man that inhabits it, but I would rather see it fall, and be buried in its ruins, than lend my voice to wound any minister, or other responsible person, however unfortunate, who had fairly followed the lights of his understanding and the dictates of his conscience for its preservation.

"Gentlemen, this is no theory of mine; it is the language of English law, and the protection which it affords to every man in office from the highest to the lowest trust of government. In no one instance that can be named, foreign and domestic, did the Court of Kings bench ever interpose its extraordinary jurisdiction, by information, against any magistrate for the widest departure from the rule of his duty, without the plainest and clearest proof of corruption. To every such application, not so supported, the constant answer has been, Go to a grand jury with your complaint. God forbid that a magistrate should suffer from an error in judgment, if his purpose was honestly to discharge his trust. We can not stop the ordinary course of justice; but wherever the Court has a discretion, such a magistrate is entitled to its protection. I appeal to the noble Judge, and to every man who hears me, for the truth and universality of this position; and it would be a strange solecism indeed to assert that in a case where the Supreme Court of criminal justice in the nation would refuse to interpose an extraordinary, though a legal jurisdiction, on the principle that the extraordinary execution of the laws should never be exceeded but for the punishment of malignant guilt, the Commons, in their higher capacity, growing out of the same constitution, should reject that principle and stretch their prerogative yet further by a jurisdiction still more eccentric. Many impeachments have taken place because the law could not adequately punish the objects of them; but whoever heard of one being set on foot because the law upon principle would not punish them? Many impeachments have been adopted for a higher example than a prosecution in the ordinary courts, but surely never for a different example. The matter, therefore, in the offensive paragraph, is not only an indisputable truth, but a truth in the propagation of which we are all deeply concerned.

"Whether Mr. Hastings, in the particular instance, acted from corruption or from zeal for his employers, is what I have nothing to do with; it is to be decided in judgment; my duty stops with wishing him, as I do, an honorable deliverance. Whether the minister of the Commons meant to found this article of the impeachment on mere error without corruption, is likewise foreign to the purpose. The author could only judge from what he said and did on the

occasion. He only sought to guard the principle, which is a common interest, and the rights of Mr. Hastings under it. He was, therefore, justified in publishing that an impeachment founded in error in judgment was to all intents and purposes illegal, unconstitutional and unjust."

III. But, I further assert that the judgment in *White v. Auditor* is and must be the law of the land, and, in attempting to sustain this position, you are asked to consider these questions, to-wit:

(1) Was the claim of Theophilus White for his salary accrued, a claim against the State of North Carolina within the meaning of Art. IV, sec. 9, of the Constitution, which reads as follows:

"The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; they shall be reported to the next session of the General Assembly for its action."

What is the meaning of this section of the Constitution? Why shall claims against the State be heard before the Supreme Court and be reported to the next session of the General Assembly for its action? Clearly the purpose is, that, after they are so recommended, the Legislature may act upon them by making an appropriation for their payment. But in the case of White, the appropriation had already been made by the Legislature and the money, according to the case agreed, was then in the hands of the Treasurer to be paid according to the law. What more could be accomplished by a suit by White in the Supreme Court, and by the recommendation of that Court to the Legislature for its payment, than had already been done by the Legislatures of 1897 and 1899? What folly would it have been for White to have applied to the Supreme Court and for the Court to have reported to the Legislature, when, at the end of the process, nothing more could have been accomplished than already existed at the time of the beginning of his suit, to-wit, an appropriation for the payment of his claim? White's claim was not an unliquidated claim against the State, but was a claim which was fixed by statute, for the payment of which the Legislature had already provided an appropriation, which, according to the statement of the facts in the controversy without action, was then lying in the treasury of North Carolina. The honorable chairman of the Managers stated that the authorities were unanimous that White's claim was a claim against the State; it would be more correct to say that the authorities are unanimous in declaring that White's claim was not a claim against the State in the sense of Art. IV, sec. 9, of the Constitution. Chapter 13 of the Acts of 1897, and chapter 19 of the Acts of 1899, expressly provided for this appropriation for the payment of the expenses of the Shell-Fish Department. No re-enactment by any future General Assem-

bly could have more effectually set apart or appropriated the moneys in the treasury derived from this Shell-Fish Department to the expenses of the same than had already been done by the Acts of 1897 and 1899. Nothing was needed to make it complete. It was a special fund, to be kept separate and apart by the Treasurer from the general funds of the State, to be specifically applied to certain purposes.

"Appropriation, as applicable to the general fund in the treasury, may, perhaps, be defined to be an authority from the Legislature given at the proper time, and in legal form, to the proper officers, to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the State."

"When the moneys are collected and passed into the treasury, the appropriation is complete. They are, in the eye of the law, dedicated to a specific purpose, and the party in whose behalf the appropriation is made can compel its payment by mandamus, as in the case of appropriations for the salaries of Judges, heads of departments, and others. That writ is the common and appropriate remedy to enforce such payment."

Field, Justice, dissenting in *Louisiana v. Jumel*, 107 U. S., 711.

There then can be no doubt that the appropriation to defray the expenses of the Shell-Fish Commission was as complete as any General Assembly could make it.

I agree fully with the counsel for the Managers, that, if there had been no appropriation, general or special, to pay White's salary, then his claim would have been a claim against the State. It can be freely admitted that the General Assembly of North Carolina has the right to establish offices and to fill them with officers, without attaching salaries, and no court could coerce the payment of salaries. The Constitution might provide for State officers without salaries or emoluments of any kind, and the courts could give no relief. The General Assembly could refuse to levy any tax or to make any appropriation whatever for the payment of salaries, now provided for by the Constitution and existing statutes, and the courts could not, by mandamus writs, force money for their payment from the vaults of the treasury. The claims for salaries under all these circumstances would be claims against the State, within the meaning of section 9 of Art. IV.

But it is a very different question, where the General Assembly has established an office, fixed the salary of the officer and appropriated a specific fund for its payment. In such cases, it has been generally held, as far as my researches have gone, that the claims for salaries are not technically claims against the State, but the suits are really against recalcitrant officials who refuse to perform ministerial duties enjoined upon them by law. Let us examine some of the authorities on this crucial point.

In *Fowler v. Pierce*, 2 Cal., page 165, which was an application for a mandamus against the Comptroller of the State of California by a member of the Legislature for his compensation as such member, the Court said:

"But it is said the remedy by mandamus is improper; that the Court may command an officer to do his duty, but can not say what that duty is, or how he shall proceed; that such practice would indirectly give creditors a right to sue the State when the Legislature had failed or refused to provide a remedy. It is true that courts can not compel judicial or other officers vested with legal discretion to act otherwise than in the exercise of that discretion. In the present case it is the duty of the Comptroller to audit the appellant's account; the nature and amount of the services are ascertained (or not disputed) and the law has fixed the compensation. The Comptroller who is bound to know the law by which he is required to act, has no discretion in such case. Nothing remains to be ascertained. He must audit the account according to the law in force; and it will be no sufficient answer to a mistake or refusal on his part, to say that he acted according to his discretion. The act of auditing an account under circumstances like these, becomes merely ministerial, and can be enforced by mandamus. The objection that this is an indirect mode of sueing the State is not substantial. The Legislature has neglected as yet to pass any law giving general creditors of the State a remedy for enforcing their demands. But for the purpose of carrying on the State government, provision has been made for the payment of officers and certain expenses of the State; and when the Legislature has fixed the amount of compensation, the fund out of which it shall be paid, and imposed the duty of auditing and paying the same on any officer or officers, they have given a remedy in that case which may be enforced by the courts of the State."

The judgment in this case was as follows:

"The judgment is reversed, and the Court below directed to award a peremptory mandamus in accordance with this opinion."

In the case of *Danley v. Whiteley*, 14 Ark., 687, which was an application for a mandamus to compel the Auditor of the State to issue his warrant upon the certificate of the Secretary of State for the public printing of the State, the Court used this language:

"It is a question of some difficulty where the submission of the State to be sued by her creditors affords an adequate remedy superseding the summary and specific one said to be obtained by mandamus. The suit permitted against the State is in the nature of appeal from the adverse decision of the Auditor and must be an ordinary suit in form, and in substance a direct proceeding against the State by name. It was not desired to make the writ of mandamus

a substitute for the action of debt or assumpsit, or a bill for an account. Here the specific relief asked for is the issuing of the Auditor's warrant, the direct fruits of which may be to enable the relator to realize a mere money demand from the Treasurer; so that the difficulty suggested is forcibly presented. Our opinion is, that although the privilege of sueing the State ought to influence the Court in refusing to award the writ, in all cases where it may be doubtful whether the officer or inferior magistrate has a discretion or acts ministerially, yet it does not take away the remedy where the distinction is clear, and the action to be done is purely ministerial, a duty enjoined by law, which the relator has a right to demand, though by the performance of it the interests of the State may be remotely or consequentially affected. Because, upon principle, and unless this be done, the Auditor could withhold the regular salary of any public officer; he could defeat the execution of the laws by refusing to obey the requisition of the Governor upon the contingent fund; and by disregarding the certificate of the proper officer of either, he might force members of the General Assembly to bring suit against the State for their per diem and mileage."

Again the same Court said:

"Those cases go further in holding that the Auditor will be compelled, by mandamus, not only to audit but to allow the salaries of public officers and agents, the amounts of which have been fixed by law, and no legal excuse is shown for his refusal."

In *Black v. Auditor*, 26 Ark., 237, the opinion was as follows:

"The salaries of the Circuit Judges are fixed by law; an appropriation has been made to pay these salaries; the ministerial duty of auditing accounts and issuing his warrant for the amount is all that remains to be done. If suit were brought against the State under the sections above quoted, and an appropriation made by the Legislature, the same ministerial duty would remain to be performed. We are satisfied that on both principle and authority mandamus will lie, and is the proper remedy if the petitioner is in fact entitled to the amount claimed." And this decision was rendered, notwithstanding the following statute of Arkansas:

"All persons having claims or demands against the State, on any account whatever, shall institute suit therefor in the Circuit Court in and for the county of Pulaski, and said Court shall proceed to take and hear all the testimony for and against the same, and shall certify the proof so taken, under the seal of said Court, to the next General Assembly of this State, after the taking of the same, together with its opinion in regard to the justness thereof; but said Court shall not enter a judgment or decree in any case whatever against this State, upon the testimony so taken, and the opinion of said Court shall be submitted to the General Assembly of this State for such action as may be deemed necessary thereon."

In the State on the relation of *Whitman v. Salmon P. Chase*, Governor of the State of Ohio, 5th Ohio State Reports, 528, the Court used the following language:

"Although the State can not be sued, there is nothing in the nature of the office of Governor which prevents the prosecution of a suit against the person engaged in the discharge of its duties. This is fully sustained by the analogy of the doctrine of the Supreme Court of the United States in the case of *Marbury v. Madison*, 1st Cranch Reports, 140.

"The official act of the law in question, in regard to issuing the proclamation asked for, is a duty prescribed by statute not necessarily connected with the supreme executive power of the State, ministerial in its nature, and a duty which might have been enjoined on some other officer. It is contended that this duty rests within the discretion of the Governor, by virtue of the provision requiring that he shall, if he be satisfied that the law has, in all respects, been complied with, issue his proclamation. The facts connected with the organization of the company and the other essential preparation preliminary to the commencement of the business of banking are required to be certified to by the Governor; and, on finding that the law has been complied with in these respects, the proclamation is required. The duty is imperative on his being satisfied of a given state of facts. It is his duty to look into the evidence presented to him, and act on a given state of facts. He has no uncontrollable power of judgment as to either the law or the facts. On his finding the existence of a requisite fact, the law is peremptory in requiring the performance of the duty."

And the same distinction prevailed in *Cotton v. Ellis* and *Bailey v. Caldwell*, in our own Reports, and in none of the cases presently to be cited from other States relating to the right to issue mandamus writs, was the point even raised that the salary of a State officer was a claim against the State.

(2) If the claim of White for his salary was not a claim against the State within the meaning of section 9 of Art. IV of the Constitution of North Carolina, the next question to be answered is, whether peremptory writs of mandamus lay against the Auditor and the Treasurer to compel the former to audit the claim, and the latter to pay it. And this question involves the answer to another, that is to say, was the act required of the Auditor a ministerial or an executive act? The Auditor had submitted the case upon facts agreed to the courts of the State. The Supreme Court had decided that White was entitled, under the Act of 1899, to a salary of four hundred dollars a year, and for so much as mileage. If the Auditor had any discretion as to what the salary and emoluments of White's office should be, which we deny, but had submitted his discretion to

the Court, and the Court in a case in which both the Auditor and the Treasurer were parties, had decided that White was entitled to a salary of four hundred dollars a year, and to five cents per mile, the Auditor had no further discretion, so far as White's salary and emoluments were concerned, but there was left to him only the duty and the power to calculate upon the vouchers presented by White, the amount that might be due him under the findings of the Court. But admit that the Auditor did have a discretion left to him, then the authorities are overwhelming to the effect that the Court had the power to compel an officer, in whom there is placed a discretion, to put his jurisdiction into motion and to exercise his discretion in regard to the matters in dispute.

"It is well settled that when County Commissioners are clothed by law with power to make or not to make any allowance at all to an officer for his services as they may think best for the public welfare, the Court can not control their discretion by a writ of mandamus, but where they refuse to entertain the question or exercise the discretion given to them in reference to it, the courts will enforce action by mandamus where no other legal remedy exists." *Koonce v. Commissioners*, 106 N. C., 192.

"If the Board of County Commissioners refused, therefore, to entertain the plaintiff's request to consider his claims and say whether he was, in their opinion, entitled to any compensation for his services, we think that there is no other remedy provided by law but a mandamus to compel action upon the subject." *Koonce v. Commissioners*, 106 N. C., 192.

And in *County Board v. State Board*, 106 N. C., 83, Justice Clark, in delivering the opinion of the Court, said:

"Even were not this beyond question, as the proceeding is to compel public officers to discharge a mere ministerial duty, not involving official discretion, the action will lie. (*Raleigh and Augusta Air Line Railroad v. Jenkins*, 68 N. C., 502; *Marbury v. Madison*, 1st Cranch, 140.) The duties here to be enforced are purely ministerial."

And in *Burton v. Furman*, 115 N. C., 172, Justice MacRae excepts such a case as White's from the reasoning of his opinion:

"Neither is there in our case a specific appropriation by statute of a sum certain to be paid to this plaintiff and a discretion to the Auditor to issue his warrant for the same, as in the case of *Sayre v. Moore*, 59 S. W. Reports, 755, leaving the ministerial duty to be performed, in which case we think the writ of mandamus would lie."

If the Auditor of our State can not be coerced by the courts to audit the salary of an officer of the State government, when fixed by the Constitution, or by the Statutes of the State, or adjudicated, in a properly constituted case, by the courts of the State, then is he in-

deed an autocrat above and beyond the law. He at once becomes the supreme power in the State, and at his will the governmental machine continues or ceases to run. If he can refuse to issue his warrant to White, he has the same power as to any other State official and as to all of them.

This General Assembly increased the salary of the Governor from $3,000 to $4,000 a year. Able lawyers, both in the House and in this Senate, doubted the constitutionality of the act. The Auditor may doubt it. If so, has he the discretion to turn away the Governor when he applies for his warrants on the Treasurer? I deny this right. I deny his right to refuse to issue a warrant to a *de facto* officer, much less to a *de jure* one. Such controversies are for the courts and not for an officer of the executive branch.

I do not believe, as Mr. Busbee seems to, that your construction of the law as to the rights of the courts to issue mandamus writs will have any binding force with the courts in future years. But, if your decision is to have the binding force of a precedent on our courts, and if we are to have courts cringing and truckling to the will of the General Assembly, I beg you, in the name of the law and of freedom, not to say by your verdict that the Auditor and Treasurer of our State possess powers as despotic as those of the Russian Czar.

The prosecution has produced no case denying the right of the courts to force the auditing by the Auditor and the payment by the Treasurer of the salary of a State official,which, in view of the learning and industry of their counsel, must mean that no such case can be found. The cases holding the contrary are numerous and weighty. Justice Clark, in *Garner v. Worth*, expressly admits that a mandamus will lie for the payment of the salary of an officer.

The following cases are to the like effect:

In *Turner v. Meloney*, reported in 13 Cal., 621, the facts were as follows: In the fall of 1858, at a general election, Turner was elected District Judge of the Eighth District for six years. He demanded his commission before January 1, 1859. The commission was refused by the Governor, who issued a commission for the same office to one Haynes. The title of Haynes to the office was then tested by a *quo warranto* in the suit of *The People ex rel. Saunders v. Haynes*, and resulted in a decision by that Court adversely to Haynes. The Governor then issued a commission to Turner, dated May 13, 1859, as having been elected to the office at said general election, and he took the oath of office according to law. At the time of his election, Turner was an Inspector of Customs of the United States. Petitioner applied for mandamus to compel defendant, Comptroller of State, to draw his warrant on the State Treasury for the salary of petitioner as Judge, from January 1,

1859. Defendant for answer set up the ineligibility of Turner, because, holding the office of Inspector of Customs, as aforesaid, averring it to be a lucrative office under the United States. The answer was demurred to and the Court below awarded a mandamus. The Supreme Court of California delivered its decision as follows:

"The respondent having been inducted into office, and his commission showing him entitled to it from the first day of January last, as Judge of the District Court, is entitled to the salary annexed to the office from that time. The question of his ineligibility can not be tried on mandamus. Judgment affirmed."

R. S. Buck was District Attorney in the State of Mississippi and filed his petition for the writ of mandamus directed to T. T. Swan, Auditor, commanding him to issue his warrant upon the State Treasurer for the sum due him for services rendered as District Attorney of said State. In the course of the decision the Supreme Court of Mississippi said:

"That the right of a public officer to receive a warrant for the salary attached by law to his office belongs to the class of cases to which the writ of mandamus is applicable, was expressly adjudged in *Page v. Hardin* 8 B. Monroe, 648, by the Supreme Court of Kentucky, and has been recognized in several cases by this Court. And it may be observed generally that in all cases where the right of the party and the amount he is entitled to receive from the State are clearly ascertained by law, leaving no discretion to the Auditor, and there is an existing appropriation for its payment, the duty to issue the warrant may be regarded as purely ministerial, and one the performance of which, in a case in other respects proper, may be enforced by mandamus. * * * It is not necessary to attempt an enumeration of the cases to which this remedy is applicable. It is a general rule that whenever a statute gives power to or imposes an obligation on a particular person to do some particular act or duty, and provides no specific remedy on non-performance, a mandamus will be granted." *Swann v. Buck*, 40 Miss., 291.

In *Harpending v. Haight*, reported in 39 California, page 189, where mandamus was granted against the Governor of the State compelling him to authenticate an act of the Legislature, is found this language:

"Would the Attorney-General, the Comptroller, the Treasurer, and the other great officers of State, by reason of their mere official rank be beyond the reach of the process of the law in all cases, and not be compelled to perform any official act, no matter how distinctly enjoined upon them? And if the State officers of the Executive Department should be clothed with this immunity, it must be remembered that the Sheriffs, Recorders, etc., in the several county

organizations are also members of the department, and upon what principle could one of them be compelled to perform his duty in any case. It seems to us that the assertion of such a doctrine would draw after it the most serious complication and confusion, both in public and private rights, and practically disrupt the whole fabric of government. We think the writ should issue, as prayed for, and it is so ordered."

In *State on the Relation of Vail v. Draper, Auditor of the State of Missouri*, reported in 48 Mo., page 213, which was an application for a mandamus for the payment of Vail's salary as the Judge of one of the Circuits in said State, the opinion in part was as follows:

"The Auditor was bound to take notice that there was no claim set up to the office by either Vail or Dinning other than was derived under the election of 1868; that Governor McClurg commissioned Vail as having been legally elected at that time, and that Vail qualified, performed the duties of the office and drew his salary therefor; in other words, that he was *de facto* the Judge, holding by color of right, and as such entitled to a salary until ousted upon proper proceedings. This opinion is strictly limited to the case now made and can have no bearing on any question as to a contest between the parties when their rights are presented for adjudication. In my opinion a peremptory writ should issue; the other Judges concur."

In *Gilbert v. Moody*, 25 Pacific Reporter, page 1092, the facts were: Gilbert was stenographic reporter of a District in the Territory of Idaho, and performed his duties and presented his claim to the defendant, Moody, Auditor of the State, for payment. The Auditor refused to allow plaintiff's claim and refused to issue his warrant, upon the ground that no appropriation had been made by law for the payment of the same. In the course of the opinion the Court said:

"The defendant also contends that no appropriation has been made for the payment of this claim as required by section 13 of Art. VII of the Constitution. The act in question makes the appropriation, it fixed a compensation, the time of payment, and authorized the Comptroller to draw his warrant to pay the same when due. No further appropriation is required. * * * The fact that there are no funds in the hands of the Treasurer of the State with which to pay said claim will not excuse the Auditor from issuing his warrant. We are all of opinion that a peremptory writ should issue, and it is so ordered."

And peremptory writs of mandamus have been issued to compel State officers to pay sums of money due individuals from the State, not for salaries, but for which appropriations had been made, in the following cases:

In *Divine v. Harvie*, 7 Monroe, Ky., 439, which was an action by Harvie, a creditor of Divine, to submit a claim due from the State of Kentucky to Divine to execution of *fieri facias*, the Court, while denying the right of the creditor of Divine, still laid down the right of Divine against the State of Kentucky in the following words:

"But as Divine might have proceeded by mandamus against the Auditor and Treasurer to compel them to pay this money out of the treasury in case of their refusal, it may be urged that the claim comes within the spirit of the term choses in action, and, therefore, is at least within the equity of the act." In this case there was no specific appropriation.

In *State of Louisiana v. Bordelon*, 6 La. Ann., 68, the opinion of the Court was as follows:

"The relator alleges that he is by law entitled to receive from the State Treasurer the sum of $2,500, but that Louis Bordelon, Auditor of public accounts, refuses to deliver to him the warrant upon the State Treasurer for the said sum, without which warrant it can not be legally paid. A rule to show cause why a mandamus should not issue to the Auditor and Treasurer was granted, and the cause shown by him is the same, to-wit: That there is no law specifically appropriating an amount of money for which a warrant has been demanded in this case, and without a specific appropriation no money can be drawn from the treasury, under the 93d Article of the Constitution. The only question, then, is this question, whether any specific appropriation has been made by law for the sum for which the warrant is claimed, in conformity with the Constitution of the State. The Judge of the First District Court of New Orleans, in which these proceedings were instituted, after a careful examination of the questions submitted, made the rule absolute and directed peremptory mandamus to be issued as prayed for. The Attorney-General, representing the Auditor and Treasurer, appealed from this decision. We concur with the District Judge in the view he has taken of the statute under which the relator claims. We consider the mandamus as enforcing the performance of an act on the part of public officers strictly ministerial, in which there is no discretion on their part, ministerial or otherwise, and that it is the proper remedy for a case of this kind."

The honorable chairman has told you that our English ancestors fought for a thousand years for the firm establishment of the principle that no money should be withdrawn from the treasury, save in consequence of an appropriation made by Parliament.

Let us see what the English courts, after the battle had been won by the people, and the observance of the principle by the King and by the courts had become one of the bulwarks of English liberty,

held as to issuing a mandamus to compel the performance of a ministerial act by a public officer.

In *King v. The Lords Commissioners of the Treasury*, decided in 1835, in the King's Bench, and reported in 31 English Common Law Reports, page 72, the facts and the judgment were these:

"The Lords of the Treasury agreed to submit a vote to Parliament for granting a retired allowance to a public officer on a certificate of ill-health (see 3 George IV, chap. 113); the vote passed, but the pension was not specifically mentioned in the appropriation act, which, however, directed a gross sum to be applied in discharge of retired allowances. The Lords of the Treasury, on application by the party for payment, informed him that he might receive it from the Treasury officer whom they named. The officer declined paying, inasmuch as he had no authority from the Lords of the Treasury, and they, being again applied to, refused to give such authority, except on condition that the party would forego certain legal proceedings, which he refused to do. Held:

"First, that the party had a legal right to the allowance, the Lords of the Treasury having submitted the grant to Parliament, and having afterwards admitted that the money for paying the allowance was in their hands.

"Second, that a mandamus lay to the Lords of the Treasury for the payment, inasmuch as the claimant had no other remedy, and as the writ was demanded, not against the King, but against officers into whose hands money had been paid under an act of Parliament for the use of an individual."

(3) What was the effect of the provisions of chapter 21 of the Laws of 1899, upon White's right to his salary, and upon the power of the Court to enforce the auditing and payment of the same?

So far, this argument has been made as if chapter 21 had never been enacted, and it therefore becomes of the highest importance to consider how far its provisions abridged or destroyed the rights that White might have possessed prior to its enactment. Section 1 of said chapter reads as follows: "Section 1. The Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shell-fish industry, unless such person or persons are authorized to render such services under the provisions of the said act, entitled to 'Provide for the general supervision of the shell-fish industry of the State of North Carolina,' and ratified March second, eighteen hundred and ninety-nine."

The act, here referred to, was chapter 19 of the Laws of 1899, and it designated George H. Hill and his associates as Shell-Fish Commissioners.

White had been duly appointed by the Governor of the State "Chief Inspector" of the oyster industry in North Carolina, in Febru-

ary, 1897, for a term of four years. White sued Hill and associates for the office, and the Court declared the provisions of chapter 19 void, in so far as they went to deprive White of his office. The contest between White and Hill raised a question, which could be settled by no tribunal except a judicial one, and the settlement of which was the very essence of judicial duty.

There existed two statutes, the one passed in 1897, the other in 1899. White claimed the office under the former, Hill claimed it under the latter. The construction to be placed on these statutes, whether the latter was an amendment to the former, whether it repealed the former, how far its provisions were void in attempting to deprive White of his office, raised questions that the courts alone could determine.

"As the Legislature can not set aside the construction of the law already applied by the courts to actual cases, neither can it compel the courts for the future to adopt a particular construction of a law, which the Legislature permits to remain in force. 'To declare what the law is or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of our government is, that the legislative power shall be separate from the judicial.'" Cooley on Constitutional Limitations, page 113.

What construction, then, did these respondents, with the late Chief Justice, put upon chapters 19 and 21, in *White v. Auditor?* They held, that chapter 19 did not abolish chapter 13 of the Acts of 1897, but was amendatory of the same. Chapter 18 of the Acts of 1899, relating to the same subject, in its title, expressly declares that it is an amendment of chapter 13 of Acts of 1897. And they further held that all the provisions of chapter 19 were valid, except, in so far as they interfered with the vested rights of White.

Previously, in *White v. Hill*, it had been decided that White was entitled to serve out his four years' term, to which he had been appointed under the provisions of chapter 13 of the Laws of 1897.

Then, as the Court construed chapter 19 to be only an amendment to chapter 13, it necessarily followed that White was holding his office under the provisions of chapter 19 as well; and that he was the person authorized to render the services prescribed by chapter 19, and was the person to whom the Treasurer might pay the compensation under section 1 of chapter 21.

The Court interpreted all of the statutes on the subject together and upheld them all, so far as they were not inconsistent with the vested rights of White.

It was the duty of the Court so to do, if possible.

"For as a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the Court, if possible, must give the

statute such a construction as to enable it to have effect. This is only saying, in another form of words, that the Court must construe the statute in accordance with the legislative intent, and it is always to be presumed the Legislature designed the statute to take effect and not to be a nullity." Cooley's Constitutional Limitations, page 218.

And it was the duty of the Court to presume that the Legislature did not intend that White should be without compensation, in case, by a decision of the Court, it should be declared that he, and not Hill, was entitled to the office.

"But we do not consider ourselves warranted by law in presuming that it was the design of the Legislature to create an office with a fixed salary, provide an incumbent thereof, and require of him the performance of certain specified duties, onerous to him, and important to the State, and not appropriate the amount of money requisite for the payment of his salary." *Byrd v. Conway*, 5 Ark., page 436.

(4) But it is now strenuously insisted by the prosecution that it is plain that chapter 21 intended that Hill and his associates, appointed by chapter 19, were the only persons that could render the services provided for in said chapter, and hence were alone entitled to compensation for rendering those services; and that chapter 21 was intended to act, and did act, as an inhibition on the Treasurer to pay White, and that this intent was so plain that the Court should have seen and observed it.

But, if this were the intent of the General Assembly, if it intended, in case the courts should, in following an unbroken line of decisions from 1833, down to the present, declare that White, and not Hill, was in the office, that White should be deprived of the salary attached to the office, and that he was to be starved out, then chapter 21 would be absolutely void and should have been so pronounced by the Court. And the foundation of the argument to sustain this proposition is, that, in North Carolina, since 1833, an office has been held to be property, and, that, while the officer may be abolished, by abolishing the office, so long as the office exists and the term of the officer lasts, he can not be deprived of it by legislative action.

If this be the law, then any attempt by the Legislature of North Carolina to take away from White his office or the salary incident thereto, and to transfer it to another, during his term, would be unconstitutional and void.

"We know of no case in which a legislative act to transfer the property of A to B, without his consent, has ever been held a constitutional exercise of legislative power in any State in the Union. On the contrary, it has been constantly resisted as inconsistent with

just principles by every judicial tribunal in which it has been attempted to be enforced." *Wilkinson v. Leland*, 2 Peters, 627.

And I go further and say, that, after the appropriation had been made, and White had been appointed, and it had been declared by the Supreme Court that he was entitled to the office, and the money had been collected and put into the treasury, then any attempt on the part of the General Assembly of North Carolina to take that appropriation from White and pay it to another, would be void. White was in the office, was carrying out his part of the contract with the State of North Carolina, and, to that extent, the contract between him and the State had become an executed one, and any effort, on the part of the Legislature, to withdraw this appropriation, placed in the treasury for the payment of the expenses of the Shell-Fish Commission, would be null and void. This position is sustained by the remarks of Justice Reade in *Clements v. The State*, 76 N. C., 199:

"We are of the opinion that the repeal of the statute, under which the contract with the plaintiff is alleged to have been made, in no way affects the plaintiff's rights."

And this case is to be distinguished from the case of *Shaffer v. Jenkins*, 72 N. C., 275, in these particulars; that in *Shaffer v. Jenkins* the contract had not been performed and was altogether an executory one, and one in which an allegation of fraud was raised by the Treasurer against the contractors.

Nor could this appropriation be withdrawn by the Legislature of 1899, after White had entered upon his duties, without violating the contract clause of the Constitution of the United States. And, besides, chapter 21, is void, if it intended to starve out an officer of the State, and, by a special law, to deprive him of his office and its emoluments. This was expressly held in *Bunting v. Gales*, 77 N. C., 283, in which the doctrine is laid down in the following words:

"It may also be admitted that the Legislature can not select a particular officer, and by a special law applicable to him alone, deprive him of any material part of his duties and emoluments. This partakes of the nature of a judicial forfeiture without trial."

But, as a matter of fact, chapter 21 of the Laws of 1899, does not pretend to withdraw one cent of the shell-fish appropriation from the treasury; it is not transferred to the general fund, nor is it disposed of in any particular whatsoever. And I further urge that, if chapter 21 had expressly named White and had provided that not one cent should be paid by the Treasurer to him, under the authorities above cited, such a provision would be void and unconstitutional, and that the courts should have so declared it.

"It is unnecessary to say how far Congress might have interfered by legislation, after the report of the Solicitor, but if there was no fraud or misconduct in the arbitrator, of which none is pretended or

suggested, it may be well questioned whether the relators had not acquired such a vested right, as to be beyond the power of Congress to deprive them of it." *Kendal v. U. S.*, 12 Peters, 611.

But it has been said by counsel for the Managers that the method provided in chapter 19, Laws of 1899, for certifying the vouchers and drawing the money from the treasury, became impossible after White had been restored to his office. If this be true, then it was the duty of the Court to declare so much of chapter 19, as made it impossible for White to draw his salary, void. A person can be deprived of his property directly, by denying to him the right to it. He may be as effectually deprived of it by leaving the right apparently untouched, but by taking away all remedy for its recovery or by prescribing an impossible one.

"So will acts of the Legislature, having elements of limitation and capable of being so applied and administered, although the words are broad enough to, and do, literally read, strike at the right itself, be construed to limit and control the remedy; for as such they are valid, but as weapons destructive of vested rights they are void; and such force only will be given the acts as the Legislature could impart to them." Cooley on Constitutional Limitations, page 219.

"The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents, acting under its authority, as well as to contracts between individuals. And that obligation is impaired, in the sense of the Constitution, when the means by which a contract at the time of its execution could be enforced, that is, by which the parties could be obliged to perform it, are rendered less efficacious by legislation operating directly upon those means." *Wolf v. New Orleans*, 103 U. S., 358.

"So far as the law is concerned, the obligation of a contract is the means by which the law enforces the legal duty, and it is that with which the law and the Constitution deal. In this sense the obligation of a contract consists in the authority or power which the law gives to enforce its performance, or to give the remedy of its non-performance. The next thing in proper consequence to consider is what it is to impair this obligation, which is at once the means and the remedy given by the law to compel a man to perform his contracts, or, in case of failure, to force him to make proper compensation in damages. It follows that to impair this obligation by a State law is, in some way, to weaken or diminish the power which the courts had, when the contract was made, to enforce it, if enforceable specifically, or to give a remedy by damages for failure to perform it." Miller on the Constitution, pages 540, 541.

"Indeed, the true line of distinction between the change which impairs the obligation of a contract and that which does not, is found

in those cases where such change of remedy leaves a sufficient and efficient remedy or provides a new and adequate one in its place." Miller on the Constitution, page 542.

So that, if chapter 19 had the effect to take away White's remedy, it was, in so far, void.

What was the effect of the resolution of June 1900? If it were intended as a threat, to be held over the Court and to prevent execution from issuing, upon a judgment, rendered in the highest Court of the State, its propriety may be doubted. If it were intended, in any way, to interfere with the rights of White, as they had been adjudged in *White v. Hill* and *White v. Auditor*, it was illegal and an infringement upon the province of the judicial department of the State.

"But the legislative action can not be made to retroact upon past controversies and to reverse decisions which the courts, in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but would be its exercise in the most objectionable and offensive form, since the Legislature would, in effect, sit as a court of review to which parties might appeal when dissatisfied with the rulings of the Court." Cooley on Constitutional Limitations, page 112.

But it is claimed that there should have been an alternative mandamus instead of a peremptory one. The Auditor and the Treasurer were parties to the suit. They had, through their counsel, agreed to a certain state of facts. It is to be presumed that, whatever defence they had to White's action, had been fully incorporated into this statement of agreed facts; then why should the Court have gone through the vain process of first issuing an alternative mandamus, when the defendants had said all that they could possibly say against the issuing of the writs?

"When the rights and the liabilities of the parties are ascertained and determined by the judgment of a court of superior jurisdiction, and the remedy can not be enforced by an execution, there is no reason why the Court may not grant a peremptory mandamus in the first instance upon a rule to show cause," etc. *Lutterloh v. Commissioners*, 65 N. C., page 403.

And it is further contended that an application for mandamus can not be heard, in the form of a controversy without action, by a Judge at Chambers.

The decision of Justice Clark in *Farthing v. Carrington*, 116, N. C., 325, is a complete answer to this contention.

"But I regret I can not concur with the majority of the Court, that the question is properly before us in this proceeding. The submission of a 'controversy without action,' under The Code, sec. 567, is simply an inexpensive and prompt proceeding to obtain the de-

cision of the Court as to the rights of the parties in a matter where the facts are not disputed. It dispenses with summons and pleadings, and can be submitted to the Judge at Chambers, as well as at term."

I have endeavored to reach these conclusions:

I. That there is no evidence upon which the respondents can be convicted of wilfully violating the Constitution and laws of the State.

II. That it is against the spirit of the jurisprudence, of both England and America, to impeach a judicial officer for a mere error in judgment.

III. That the judgment rendered in *White v. Auditor*, and the issuance of the writs of mandamus therein, against the Auditor and Treasurer, were fully authorized under the rulings of our own courts and under those of the courts of many other States.

(1) That White's claim was not a claim against the State within the meaning of section 9 of Art. IV of the Constitution.

(2) And that, therefore, a mandamus should have been issued to compel the Auditor to audit, and the Treasurer to pay it.

(3) That the Court properly construed chapter 19 of Acts of 1899 as an amendment to chapter 13 of Acts of 1897, and properly held that the purpose of chapter 21 was not to take away from White his salary, in case it was judicially determined that he was entitled to the office, to which he had been appointed in 1897.

(4) But that, if chapter 21 were intended by the General Assembly to operate as an inhibition upon the Treasurer to pay White the salary attached to the office, which the courts might declare belonged to him, then it was void, and in no way affected White's right, and the Court should have so held.

SPEECH OF THEO. F. DAVIDSON, OF COUNSEL FOR THE MANAGERS.

"A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."—Constitution of North Carolina, Art. I, Sec. 29.

Mr. President, Senators:—We can not conceal from ourselves if we would, and we should not if we could, the fact that we are facing a great crisis in the history of our State. The conflict which was precipitated, soon after the organization of the Federal Government, by the claims of some of the Judges, of extraordinary powers and jurisdiction, for the judiciary, was averted by the moderation and wisdom of the patriots who had founded the government, and who were devoted to its principles. For a long period the various departments of our political organizations carefully preserved their respective functions, and working harmoniously, as contemplated by the Fathers,there followed an era of peace, progress and happiness rarely enjoyed by any people. Unhappily, the tremendous shock of the civil war shattered the structure, familiarized the public mind and conscience with the ideas and practices of tamperings and violations of the Constitution, and presented opportunities, which were at once seized, to revive and press the claim of the judiciary to a paramount and controlling influence in the government of the people.

The cloud which twenty-five or thirty years ago was "no bigger than a man's hand," has spread over the whole political sky. Thoughtful men all over the country have been watching with increasing uneasiness the gradual encroachments of the Judicial Department on the other Departments of the government. From the press, the platform and the hustings, and even from the Bench, wise and patriotic men have sounded the warning, in no uncertain tones.

The crisis has come, and perhaps it is well that it has come now, and that here, in North Carolina, this great issue should be joined and settled.

Senators, this is not the first time in the history of the long struggle for the right of the people to establish and control their government, that North Carolinians have been the advance guard. Their past is secure and glorious; shall we now uphold or lower the record?

I yield to no man in respect and pride for the great and good men who have illuminated our annals on the bench. I never hear the

roll of the names of Henderson, Ruffin, Gaston, Pearson, Smith, Merrimon and their associates called without a quickening of the pulse and a warming of the blood, for that I am their countryman, and have a share in the heritage of their fame. But the records of the other departments of the government have been no less illustrious; indeed, it may be justly said that to Johnston, Caswell, Davie, Edwards, Macon, Mangum, Morehead, Caldwell, Graham, Bragg, Vance (I mention only the dead), and a host of others, who never sat upon the bench, but who served in the Legislature and in the Executive departments, the people of North Carolina are most indebted for the development and prosperity they have received and enjoyed, and for the elevated position the State has always maintained in the Union. It should, however, never be forgotten that the greatest service those great Judges rendered to their country,and their surest hold upon the veneration of the people, was not so much in the conscientious care, the profound learning and exalted sense of justice—great as were these virtues—which they exercised and displayed in the administration of the laws in the affairs of their fellow-citizens, but in their accurate conception of the genius of our form of government, in their reverence for the spirit of our Constitution, and their confidence in the right and capacity of the people to establish and control their own affairs. Above all, they knew the limitations of the high powers with which they had been entrusted; they recognized the delicate and sometimes dangerous relations of the co-ordinate departments of our political structure, and, guided by these high conceptions, they most scrupulously kept within the sphere of their legitimate functions, and conceded—nay, more—asserted the equal dignity and co-ordinate and separate powers of the other branches of the government, and thus kept vigorous and true the "blessings of liberty." It was an evil day when these principles were abandoned, and these examples ignored.

We Americans have sometimes been taunted with the criticism that we are a shallow-minded people, easily led by sentiment; fond of "catchy" phrases and high-sounding words; and especially devoted to "glittering generalities." Perhaps it is to these amiable, if not very creditable characteristics, we are indebted for that expression and idea of which we have heard so much recently, and which the counsel for the respondents "roll as a sweet morsel under their tongue"—the independence of the judiciary. One can well understand why Judges of the "lesser sort" should delight to parade this assumption before the admiring gaze and awe-struck emotions of the populace in rural country court weeks, for thereby a temporary official diginity and personal consideration might be acquired which neither the qualifications nor conduct of that particular Judge would receive.

An independent judiciary! Independent of whom? Independent of what? We find no such expressions in our Constitution, or in the laws enacted in pursuance thereof, providing for the Judicial Department. The judiciary is no more "independent" than the Executive or the Legislature. What the founders of our government intended, and what they declared in the Constitution, was that these departments of the government should be *separate* and *distinct* from, not independent of, each other. They are equal, co-ordinate, but instead of being independent of each other, they are mutually dependent; the Judiciary and Executive departments depend upon the Legislature for the money and machinery necessary to enable them to perform their respective functions; the Legislature depends upon the Executive to execute its commands, and upon the Judiciary to administer its enactments. These repositories of power must necessarily rely upon each other.

I venture to say that if a suggestion had been made in the convention which framed the Constitution, that the Judicial Department should be independent, in the sense it is now so lavishly used, it would not have received a single vote or supporter. Nothing was further from the minds of the men who framed our organic law. The danger they appreciated and endeavored to avert was, the uniting, combination of all the powers of government, legislative, executive and judicial, in one man or body of men, the centralization of political power; their reflection, as well as experience, convinced them that the great danger to the public liberty would proceed from the absorption of all powers of government by one man, or one class; and it is against that very danger—for the attempted usurpation of the powers of legislation by the judiciary—that the articles of impeachment you are now considering were presented.

Hence, it was that political powers were distributed to "separate and distinct" departments and officials—not independent, but co-ordinate—working together harmoniously, under a wise and beneficent general system of mutual support and sympathy, a system which, if observed in its true spirit, guarantees the best government the world has ever seen. When we speak of an "independent judiciary," or an independent executive, or an independent Legislature, we forget the fundamental principle of our organization, and at once suggest the idea of rivalry, jealousy and conflict, where there should be always co-operation, confidence and harmony. If we had less of this "rant" of an independent judiciary, we would, perhaps, have been spared the ordeal through which we are now passing.

"Ours is a government of laws, and not of men." So we are fond of saying, and so it should be; but is it not probable we are lulled with the rhetoric of the expression, the glittering generality of the phrase? A government of laws, and not of men, is the ideal govern-

ment; but those laws should be plain, easily accessible to all the people, proceeding from responsible authority and subject to as little change as may be compatible with the greatest good to the greatest number. In our American system we endeavored to secure that ideal by incorporating general, fundamental principles into the permanent form of a written constitution, and subordinate thereto,to provide the necessary machinery for the operation of government, and to meet the constantly changing wants of society, by legislative enactments. This seems simple and devoid of danger, but there has grown up in this country, and recently has become flagrantly rampant, another kind of law—so-called—which has properly been dubbed "Judge-made law." Some irreverent laymen, not regardful of the diginity of the judiciary have described it as "government by lawyers," a system—it does not deserve the name of a system, but a practice—claiming almost inspired origin, defying limitations—vast, irresponsible, confused, uncertain and vexatious, often oppressive and tyrannical, not infrequently corrupt, its unrestrained effects have wrought a great revolution in the actual workings of our institutions. By its means the Constitution has been undermined; the legislative and executive functions degraded to the position of subordinate bureaus of government; the will of the people manifested through the proper constitutional methods contemptuously disregarded, and all the powers of government are being rapidly absorbed by one class—one department—the precise danger which our fathers so much dreaded, and which they so solicitously endeavored to prevent. It is with the Federal judiciary this great abuse has become most common and dangerous, due, perhaps, in a great degree, to the fact that Federal Judges are appointed to their offices, hold them for life, and are absolutely irresponsible for their conduct, not only to the appointing power, but to the people.

Permit me, Senators, to read to you some extracts from an address delivered only a few years ago, by one of the ablest and best known jurists and law-writers in the country; it states with so much clearness and terseness the views I have been trying to elucidate, that I am sure you will pardon my use of the author's language. (Judge Thompson, American Law Review, Vol. XXX, 678—80.)

Speaking of the gradual, but constant and insiduous encroachments of the judicial upon the powers and prerogatives of the legislative and executive departments, he says:

"It is to be profoundly regretted that this salutary principle was first violated by the Judicial Department in the case of *Marbury v. Madison*, already referred to. The power was there asserted on the part of the judicial branch of the government to direct coercive process against officers of the President's cabinet—in effect against the President himself—to compel the doing of acts that were regarded

as ministerial merely. The Supreme Court, while disclaiming such jurisdiction for itself, since, with certain limited exceptions, it had appellate jurisdiction only, asserted it for the inferior Federal judicatories; and its exercise was attempted by them, but was successfully resisted by President Jefferson, and, in my judgment, rightfully resisted. But, following the doctrine of this decision, or rather of this extra-judicial fulmination, for the Court had really nothing to decide, except its own want of jurisdiction to decide anything, the State judicatories have, almost without exception, asserted the power to control the action of the Executive Department of their State governments in what are called ministerial matters, that is, matters which do not involve the exercise of an exclusive discretion, by sending writs of mandamus to the heads of executive departments, and even in some instances, to the Governor himself. It is true that no Federal judicatory has sent its writ of mandamus or of *certiorari* to the President of the Senate, or to the Speaker of the House of Representatives; that is yet to come in the manifest and steady progress of usurpation. The Federal judiciary have found other means with which to lay their coercive hands upon the Legislative Department of the government, even to the extent of restraining the Houses of the National Legislature in the just exercise of their powers. * * * Men are greedy of power; Judges are but men; Judges are, therefore, greedy of jurisdiction. The known tendency of all courts is to amplify their own jurisdiction. The Court which assumes without challenge, to judge finally and exclusively, not only of the extent of its own powers, but also of the extent of the powers of both of the other branches of the government, may well challenge attention. So long as this right is acquiesced in, we shall witness the spectacle of Federal judicatories continually enlarging their own powers, by successive encroachments upon the corresponding powers of the legislative and executive branches of the general government, and of all branches of the State governments.

"To promote this expansion of power, we have seen the Legislature of a State prohibited from repealing a public grant, got from its predecessors by the most notorious corruption. We have seen the Legislature of a State prohibited from making a useful modification of the charter of an elemosynary corporation, long after the death of all its founders; and subsidiary to this, we have been taught the doctrine that an executed gift is a contract within the meaning of the Federal Constitution. We have seen the sovereign powers of taxation bargained away by corrupt Legislatures to private corporations, and future Legislatures prohibited for all time from resuming the power. We have seen, under the name of preserving the inviolability of contracts, rights got by bribery from venal Legislatures endowed with sanctity and immortality and placed forever beyond the reach of the people. We have seen useful and necessary revenue

laws of the States and of the United States suspended and nullified. We have seen the executive officers of our governments, both Federal and State, subjected to compulsory judicial process. We have seen corporations aggregate declared to be "citizens," within the meaning of the same instrument, for the purpose of enlarging the jurisdiction of the courts of the United States and seizing a portion of the jurisdiction rightfully belonging to the States. We have even seen the Supreme Federal Tribunal arrogate to itself, with a general public acquiescence, the jurisdiction of deciding, between two contestants, which is the lawful governor of one of the States, a question, which, from its very nature, eludes Federal jurisdiction and control."

And I direct your attention to another, and, if possible, a more extreme and unfortunate result of the exercise of this vast, undefined and undefinable assumed, if not usurped, power. It has been so short a time that we can all recall the great antagonism which arose in this country between the people, especially those engaged in business depending upon the facilities for transportation, and the owners and managers of the railways and other common carriers. So acute became the conflict, so exasperated the public feeling against the supposed or real oppressions and exactions of those agencies, that violence, disorder and destruction became flagrant. State Legislatures could only partially deal with the trouble, and Congress took up the task, and, after a long and careful consideration, the Inter-State Railway Commission, a tribunal with ample powers to inquire into abuses, to correct them, to provide rules for the fair adjustment of rates, to hear and determine controversies arising out of the transportation of the commerce of the country—all this, with the least possible delay and expense to the people. The delays and enormous expenses attending the adjustment of these questions by the courts had demonstrated their unfitness, if not their incompetency, to deal with them. But these courts lost no time in attacking this trespasser on their preserves. Year after year its powers have been whittled down, piece by piece, its functions have been pulled away by judicial construction, until the foundations of the commission have been sapped and it stands to-day a skeleton—a most instructive illustration of how helpless the people may be to reform abuses and better their condition when opposed by "Judge-made law." So rapid has been the growth of this power—especially within the past few years—so far-reaching and comprehensive its exercise, that it is no exaggeration to declare that, to-day the great bulk of the actual, effective governing power in this country is in the Federal judiciary; the fortunes and destinies of this great republic are ultimately in the hands of five men, a majority of the Supreme Court of the United States, men who, however, distinguished for learning and ability, are yet men like ourselves, subject to all the hopes, fears,

passions, ambitions and weaknesses of common humanity, for "there is no alchemy on the bench that can change human nature."

Shall these abuses continue? Shall the dangers which so certainly impend be permitted to grow without an effort to remove or arrest them? Shall we, yielding a sordid subserviency to the gross materialism of the hour, stand idly by and make no effort, until the explosion comes? For come it will, as surely as the sun will rise on the morrow, if the government is not changed and turned back to its constitutional channels—and then,

> "A greater wreck, a deeper fall,
> A shock to one, a thunderbolt to all."

I hail what I believe many agencies, even now operating for the aversion of these dangers; the people are becoming aroused; uneasiness has passed to apprehension; apprehension has become alarm; and if the signs of the times are but given due consideration, the end of the trouble is not far distant. I believe implicitly in the genius of the Anglo-Saxon for self-government; I have an abiding faith in the ability of the American people by proper and orderly methods to correct evils and reform abuses in their social and political economy. It does not require the events of the last thirty years, in North Carolina, to justify my unalterable faith in the power and resolution of my people—your people—to keep their Constitution, their laws, their cherished institutions, in the ways marked out by their fathers.

This is why we are here to-day, for the poison has penetrated our own State; these Respondents, unmindful of their high duties, yielding to the temptations of the thirst for power, seduced by the apparent triumph of their judicial brethren on the Federal bench; their official pride aroused by the very fact that their power has been questioned, have advanced step by step through a series of decisions known as the "office-holding cases," from the doubtful ground of *Hoke v. Henderson*, through the mazes and wildernesses of *Wood v. Bellamy*, *Day's Case*, *Beddingfield v. Abbott*, and the others, which have been offered in evidence, until, in a fatal moment, they contemptuously disregarded the statutes of the Legislature, the plain and positive commands of the Constitution, recklessly daring to do that which no other Court, in any jurisdiction, even where the usurped powers of the judiciary had been carried to its remotest extent, sent their process into the public treasury, and assumed to dispose of the public revenues of the State! And now the day of judgment has come!

I shall not discuss those "office-holding cases" in detail. Many of you are familiar with them, as lawyers, and all of you have them before you as evidence. It is not a pleasant subject for discussion to the lawyer or to the citizen. I think that all of us would rejoice if

the record of those cases could be obliterated from our annals. You may be sure no portion of the community more deeply deplores the conduct of the majority of the Court in those cases than a very large number of the most distinguished members of the bar of the State—gentlemen whom we have all been accustomed to regard in the highest rank of the profession, not only for learning, but for conscientious and elevated ideas of judicial propriety and good citizenship. It is, perhaps, not the least disagreeable reflection that those Judges who participated in those judgments have thereby done more, in the short period within which they were promulgated, to destroy the confidence of the people in the judiciary—to undermine that reverence which North Carolinians have heretofore exhibited for their courts, probably more than any other people—than all other causes combined, not excepting the wretchedly corrupt and disgraceful conduct of some of the Judges, and the courts, during the reconstruction period.

Nor shall I comment much upon the principles enunciated in the famous case, *Hoke v. Henderson.* The two legal propositions there announced are: (1) The power and duty of the Judicial Department of government to declare statutes enacted by the Legislature void when, in the opinion of the Court, they contravene some provision of the Constitution; and (2), the right of an incumbent of a public office to that office was a property right and placed by the Constitution beyond the control of the people, for whose convenience and benefit it was created.

It is not necessary to establish the guilt of these respondents under the charges embraced in the articles of impeachment before you, to controvert the soundness of the first of these propositions; for the purposes of this trial the honorable Managers might well concede it. I venture now only to observe, in that respect, that in no other civilized government is such power recognized, or attempted to be exercised; that you will search our Constitution in vain for the grant of such power. Its only source of authority is that which tyrants in all ages have invoked for the acquisition of power—necessity—and that the doctrine has never been accepted by our people; that it was repudiated and denounced by many of the ablest men who assisted in the formation of our governments, State and National, and since has been met with the earnest protests of many equally as able and patriotic men. If the people seem to have acquiesced in the exercise of this admittedly dangerous power, as is so often now claimed by its advocates, we should consider that no opportunity has ever been given them to express in a formal way their acquiescence; that when the principle was first announced from the bench it was so limited in its operations that it was believed it would be very rarely exercised; the character of the judiciary in the earlier periods of the republic furnished a guaranty that the power might not be abused, and the

fact that the doctrine was, with one or two exceptions, applied in controversies not affecting the political rights of the people, but to those between individuals, who, however grievous might be their condition, could not hope to enlist public attention in their behalf.

In respect to the second proposition, *i. e.*, that a public office is private property, I call your attention to the fact that this is the only State in the Union where such a doctrine is tolerated. We have the "proud pre-eminance"—perhaps it would be more truthful to say we have the unenviable notoriety—of having the only Judges and courts who hold that public interests, the common welfare, public policy, every consideration of sound political economy must be subordinated to the petty right of some office-holder to receive his fees or salary and enjoy his emoluments of place!

No one who has carefully read the opinion of the great Judge—for he was one of the greatest of Judges—in *Hoke v. Henderson*, can fail to notice that he was not entirely satisfied with the soundness of his position; the long and labored discussion, the absence of reference to precedent, the extreme care he manifested to confine the discussion to constitutional offices—those offices expressly provided or recognized by the supreme organic law—that the right of the claimant was to the emoluments, and not to the exercise of the duties of the office, all seem to warrant the conclusion he was conscious of treading an untrodden and dangerous road. I venture the belief that if it had then been suggested to him that his words, as contained in his opinion, would be invoked by some of his successors as authority to declare the Legislature was powerless to control and abolish temporary offices, created from time to time to meet the varying needs of the public service; that the Legislature had no more control over legislative offices, as distinguished from constitutional offices, he would have been aghast. And, I think, we may safely assume that had he been on the bench when Day's and the other "office-holding cases" were considered, the people of the State would have been spared this spectacle, for he was a patriotic and wise man, and in the light of the advancement and progress and necessities of the people, as developed by the demands of marvellously rapid civilization, he would have recognized the right and power and cheerfully co-operated with the Legislature in its efforts to increase the efficiency of government and promote the general welfare. The suggestion that Chief Justice Ruffin and his associates would, in defiance of the express commands of the Legislature, even should the Constitution be silent on the subject, have issued the process of the Supreme Court to the heads of co-ordinate departments of the government and assumed to appropriate the public revenues, "staggers human credulity;" and the attempt of these respondents to invoke the authority of those great men in defense of their reckless abuse of accidental

power, can not fail to be regarded as an offense against the memory or the dead.

The inevitable climax of this usurpation was reached in the case of *White v. The Auditor.* It is difficult to consider the position and conduct of these Respondents, and the majority of the Court, in that case with that respect for the tribunal and the individuals who participated in its conclusions, which all of us, layman and lawyer, would like to maintain.

The history of our legislation for the last half century furnishes no more interesting subject than the various methods attempted to protect and develop the great fishing interests of our State. The problems presented are serious, exceedingly difficult, and their solution must be the result of experiment and experience. No session of the General Assembly since 1865 has closed without some effort to inaugurate a new or amend an existing system for the encouragement of this great source of wealth to our people. The vast expanse of the waters of the broad sounds which border our coasts, the number and volume of their tributaries, the peculiarities of local conditions, the wonderfully rapid increase in the methods of successful prosecution of the industry and its incidental commerce, present the most inviting field for the enlightened and painstaking legislator.

If we have not reached an adequate and comprehensive plan, it is because of the inherent difficulties of the question; but there has been at least aroused throughout the State a profound sense of the great importance of wise and liberal policy in this respect, not only because it may promote the welfare of our fellow-citizens who are actually engaged in the business, but also that it will redound to the general prosperity of all our people. Repeated and necessarily tentative legislation has been adopted, and doubtless much more legislation of similar character will be required. Who shall be the judge of the necessity and character of this legislation? Shall it be the people acting through their representatives in the Legislature, or shall it be a majority of the individuals who may happen to be on the Supreme Court? One would suppose this an idle question, in view of the form and genius of our government, but it has become, by the conduct of these Respondents, a very serious and practical question; indeed, so far as they could they have established the proposition that while the General Assembly may initiate such legislation, or reform previous legislation in its discretion, yet, it must be subject to the revisory powers of the Court—to uphold and enforce if it chooses; to amend, to veto, to destroy if it so wills!

The Legislature of 1897, the majority of which was in political sympathy with these Respondents, in the exercise of its constitutional functions, enacted an almost entirely new system for controlling the fish industry. The statute has been often read and com-

mented upon in your hearing during this trial, and it is not necessary that I should discuss it in detail. It is sufficient to say that under its provisions the execution of the statute was conferred upon one officer, and that officer was Theophilus White, who, it so happened, was also in political sympathy with these respondents, and, no doubt, faithfully and cheerfully aided in their elevation to the honorable places they occupy.

The plan failed, as it was bound to fail, for it was radically faulty in conception and incapable of successful execution. It must be apparent to all—to the dwellers in the mountains as well as upon the coast—that the ability to supervise a great and growing industry of this kind, requiring constant personal and most vigilant supervision, extending over a vast area of land and water, where communication is slow and uncertain, involving the adjustment of rival differences, a knowledge of local conditions could not be possessed by any one man. The failure was immediate—complete—and the disappointment of the people very soon terminated in disgust, and the whole scheme became a ridiculous farce. In this condition the General Assembly of 1899 found affairs, and responding to the will of the people, especially those whose interests were most directly involved, and many of whom were actually dependent upon wise regulation for their daily bread, enacted chapters 19 and 21, Laws 1899, and provided that this great interest should be confided to the supervision of a board, whose members, residing at different points in the territory affected by the legislation, representing every locality, having knowledge of special wants and conditions, having opportunity to give constant attention to the execution of the law. But, alas! the majority of the Legislature that attempted this wholesome reform was not in political sympathy with these Respondents, nor with their political sympathizer, Theophilus White, who had no idea, it seems, of surrendering the good office he happened to hold, even if the public interests should be obstructed. Whether he originated the plan of campaign by which the legislation was to be attacked, or whether he had a "tip" from some one "at court" we shall perhaps never know, but the majority of Judges on the Supreme Court had quite recently shown in the "office-holding cases" what it could do in smashing legislation when its blood was up; and, while it was a "long shot and a desperate chance," the prize was worth the effort. The contest began, and the result showed that, for a time at least, Theophilus White and these respondents, with the aid of their colleagues on the bench, who held the same political and legal ideas, were more powerful than the Legislature, and mightier than the Constitution itself. It is impossible to review the history of the case *White v. The Auditor*, from the inception of the proceedings to the issuing of the mandamus, without being unpleasantly impressed

with the singular irregularity and suspicious methods pursued. It was "fixed up" in Raleigh—a "controversy without action"—sent to the Judge holding the courts in a distant district, with urgent requests to hurry it up. Notwithstanding the immense importance of the questions involved to the State, as well as individuals, the Attorney-General, the proper and responsible officer to control such causes, was not even informed of the matter; the case was submitted at Chambers, without a verified complaint, as required by our statute; was decided by the Judge below without argument or presence of counsel; hurried to the Supreme Court, where it arrived after the call of the district in which, according to the rules and practice of that Court, it should have been docketed and argued; was "advanced" by special motion and by consent of attorneys for the defendants, and submitted near the close of the term, practically without argument, without any suggestion to or from the Court of the grave questions involved, the only matter apparently engaging the attention of the parties being the amount claimed to be due White, and how he should get it!

It was not until the case got into the conference room the real question involved was raised by Judge Clark. Then it was the warning voice of their associate was heard, calling attention to the many and great dangers hidden in that apparently innocent and harmless "case agreed." But the warning and protests of Judge Clark were in vain. As far as they were able, these Respondents and their sympathizers on the bench closed his mouth and suppressed his action; he was taunted with his dissenting opinions, his views were the subjects of judicial sneers, and he was almost personally insulted because he would not yield to what he believed was a radical departure from the usual practice of the Court, a plain violation of the Constitution, and an unprecedented usurpation of legislative power. That conference room does not present a very edifying spectacle for the contemplation of our people.

But the majority were determined; they had reached a point where, in the slang of the prize-ring, it must be determined which was the "best man"—the Court or the Legislature. Again, they invoked the authority of the doctrine in *Hoke v. Henderson.* One would suppose that a decent respect for the memory of that case would have induced them to permit what scattered fragments they had left of it, after their raids on it in the previous "office-holding cases," to remain in peace, but not so; it had triumphantly borne them along so far and would serve them again. It is true they had extended, expanded and strained that case beyond all reason; it was expected to stand one more draft upon its authority. But with all their sophistry, casuistry and judicial gymnastics it could not quite meet their necessities, and in the last resort they called upon their

old friend, "*in pari materia*," which had served them so loyally in *Wilson v. Jordan*, *McCall v. Webb*,and other cases presenting the same features; they struck out of the statute fundamental and essential provisions, inserted others never contemplated by the Legislature, and solemnly announced the conclusion that, notwithstanding the positive commands of the law, the often repeated declared intent of the Legislature, the avowed and well-known public policy which had been adopted by the constitutional law-making power, that White was yet the chief of the great fishing industry of the State, and as such was entitled to exercise, or attempt to exercise, the functions which had been abolished by the General Assembly, and to receive the salary and fees incident thereto!

Could the encroachment of "Judge-made law" go further? It would seem this was the *ultima thule* of aggression; but the end is not yet reached. It has been decided that White is yet in office; that he is entitled to his salary, but the funds needed to pay it were in the treasury of the State, guarded and protected by the Constitution from any interference or appropriation, save by the people who contributed them, acting through their duly constituted representatives —the Legislature.

"The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action." (Constitution of N. C., Art. IV, sec. 9.)

"No money shall be drawn from the treasury but in consequence of appropriations made by law." (Constitution of N. C., Art. XIV, sec. 3.)

Could any declaration, command or prohibition be simpler or plainer? How shall these provisions of the Constitution for which the respondents profess so much conscientious solicitude, be avoided? It is no longer a fight against legislative enactment, those have already been demolished, but the Constitution itself is in the way, and must be undermined, overleaped, circumvented or breached, for Theophilus White must have his money; the universe no longer revolves around the sun, but round about White and his salary. And now comes the grand *finale*. Some one—and we must give him the credit of a fertile brain and adamantine nerve—evolves from his "inner consciousness" and proclaims with all the affectation of sincerity, that White's demand for his money is not a "claim against the State" within the meaning of the clause of the Constitution which I have cited; that the act creating the office containing a provision for his compensation was, in effect, an "appropriation" by the General Assembly, and the act being still in force as to him, the refusal to audit his account and to pay it is a disobedience of legisla-

tive command by the Auditor and Treasurer, and their obedience can be enforced by mandamus! The fact that a subsequent Legislature had abolished the office, repealed the appropriation to pay any salary thereto authorized; that the Legislature had gone further, and by a special act specifically commanded the Treasurer not to pay that salary, are of no consequence. Once a salary, always a salary! Although the demand is disputed, is denied, is repudiated in the most positive manner upon every occasion, it is not a "claim against the State," and the State treasury is not protected by that clause of the Constitution from "process in the nature of execution" against it! With all possible respect for the gentlemen who have urged this view, I can not escape the belief that it is a petty trifling with words, fit, probably, for a police court, but unworthy this great occasion and tribunal.

I was much interested in the attempt of the learned counsel who opened the argument for respondents, to define and limit the class of claims to which the Constitution applied; and I could not but sympathize in his evident distress under the burden he had assumed. He, without doubt, had in mind the origin of the principle upon which that provision of the Constitution was founded and could not avoid the conclusion that it was applicable to just such a case as that now presented. It is a fundamental principle in jurisprudence and political economy that the State—the sovereign power—can not be sued in its own courts, except by its assent, expressed in the most direct manner. The reasons for this are instantly obvious to anyone who knows anything of the nature of government and its relation to individuals.

The "non-suability" of the States was one of the great questions which arose and was discussed in the formation of our National Constitution. If there was one idea more jealously cherished by the framers of that instrument than another, it was that the several States should not be answerable in the courts of the Federal Government, or any other government, at the suit of any person. North Carolina was especially watchful of that point, and the failure of the Constitution, in its original form, to be more explicit on that subject, was one of the reasons for her reluctance and delay in adopting it, and going into the Union. And it transpired her apprehensions were not unfounded, for shortly after the government was organized, the Supreme Court of the United States, in *Chisholm v. Georgia*, did hold that a State might be sued in the Federal jurisdiction. It is the glory of a great North Carolinian, Judge Iredell, that the heresy was at once exposed in a dissenting opinion absolutely unanswerable from my point of view. It so aroused the people that they at once adopted the Eleventh Amendment, which forever put an end to the danger—if constitutional declarations and prohibitions have the

power to restrain ambitious Judges and power-loving courts. This immunity of the States from suits and legal process, acting through its officers and agents, as all governments must act, has been carefully guarded all the way through our history. But while thus protecting its sovereignty and dignity, it recognized the fact that in many instances, its citizens might have demands—"claims"—against it, meritorious in character, and a denial of which would result in grievous individual wrong. Hence, the provision giving the Supreme Court the right to investigate and recommend, but it accompanied that provision with a repetition of the ancient law that no process should issue against the State. Is it conceivable that if the refined distinction which is now attempted, was contemplated, it was not provided for? No, the Constitution is as broad as was the ancient law. The State, and its treasury, are protected by them from all "claims" and demands, no matter what their origin, character or condition, which the State Legislature does not recognize. To narrow the operation of the principle within the limits now urged, would rob the State of an essential prerogative, lessen its power, lower its dignity, and subject it to all the embarrassments of private corporations and individuals.

But the suggestion met the requirements of the case; it furnished the only way by which the Constitution might be circumvented, and it was adopted. The mandamus—nay, a double-barrelled mandamus —directed at the Auditor and Treasurer, was issued, the treasury doors were prized open, the people's money taken against their consent, and applied to an object which they had expressly forbidden. The hesitation and vacillation of the Court as to whose duty it was to issue the process, to my mind exhibits pregnant evidence that the members of the Court who participated in those proceedings were at last impressed with the desperate character of the course they were pursuing; but, associated with this state of affairs, was the further fact that they refused to follow Judge Clark's advice and issue an alternative mandamus, the effect of which would have been to leave the matter open until the assembling of the next Legislature, when doubtless the conflict of the two great departments of our government would have been averted.

But it was not to be. We can not, it seems to me, escape the conclusion that the majority of the Supreme Court of North Carolina, including these Respondents, consciously or unconsciously was stubbornly determined to set itself up as the arbiter, the final Pope, the supreme and dominant power in the State, to assert its right to revise and repeal legislation not in accordance with its views, to interpret the Constitution according to the necessities of the exercise of this great usurped power. Shall these ideas prevail? Shall these practices continue among us?

Whatever may be the final conclusion of this Court upon the issues now submitted to it, every patriotic citizen of this State must contemplate this scene with sentiments of respect, of reverence for the genius and institutions of his State. This august tribunal—the most exalted known to our Constitution—the high official positions of the distinguished respondents, the gravity of the questions to be decided, will make it an epoch in our history—an epoch not surpassed and rarely equaled in the chronicles of the people. The long struggle between the principles of constitutional government and the universal thirst for power by those who have been selected by the people to discharge certain public agencies, has, I hope, in this old Commonwealth reached its last stage, and I trust that when this Court shall have closed its record those fundamental principles of constitutional republican government will have been vindicated, the boundaries of tne respective departments re-marked, and the machinery of our political organization once more put in that harmonious operation which its founders contemplated, which its successful continuance requires, and which that highest of all human laws, *salus populi*, demands and commands. I do not believe a fairer field, a nobler arena, could be found for the trial and proper adjustment of this great question.

It has been said that the people of North Carolina have always exhibited a remarkably accurate conception of the true principles of Republican government, and a greater aptitude for their practical utilization than those of any other State in the Union. One of the first colonies, one of the original thirteen States, its settlements and population increased and expanded more slowly than any of the others. At first its population was not altogether homogeneous, the East being settled by the English chiefly, the West by the sturdy Scotch-Irish; but in process of time common dangers, sympathetic ideas of the rights of mankind inspired a common glorious destiny, formed them into a community as distinguished for conservatism in peace as it has ever been renowned for courage and valor in war. With a less infusion of foreign blood or alien ideas than any other community on the continent, with inherited ideas of the genuine principles of free government, it need not, to a philosophic mind, have excited surprise that, when the supreme moment came, its people were found better equipped in the comprehension of the real issues at stake and prepared to bring to the contest greater endurance, more sacrifice and a loftier patriotism than any other.

It was under the inspiration of these principles, under the guidance of this genius, that John Ashe and the men of the Cape Fear, long before the famous "tea-party" in Boston, marched in the open day, not under cover of darkness, or the protection of disguises, with their flags unfurled, their drums beating and their muskets at

their shoulders, up to the palace of the Royal Governor, under the guns of the Royal Men-of-War, and seized the representative of Royal despotism and power, and forced him, at the will of the people, to surrender every vestige of authority to exercise the despotic powers with which he had been clothed. And never again was the odious Stamp Act attempted to be enforced in North Carolina!

It was the same spirit, and in support of the principle that the people of a nation had the God-given right to make their own laws, to rule their own land, that the Alexanders, the Averys, the Brevards, Polks and other not less devoted patriots proclaimed from the hills of Mecklenburg that Declaration, which has, by universal approbation, been accepted as the gospel of republican government.

So that when they threw off the yoke of foreign government, and proceeded to found one better suited to their conditions and more consonant with their convictions, they, with infinite pains and emphatic precision, formulated those great principles into short, terse sentences expressed in vigorous and homely English and inscribed them upon the corner-stones of the political structure they were to erect.

In the Declaration of Rights they solemnly declared:

"Section 1. That all political power is vested in and derived from the people only."

"Section 2. That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

"Section 4. That the legislative, executive and supreme judicial powers of government ought to be forever separate and distinct from each other."

"Section 5. That all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised."

"Section 16. That the people of this State ought not to be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in General Assembly freely given."

"Section 20. That for redress of grievances, and for amending and strengthening the laws, elections ought to be often held."

"Section 21. That a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

With the men who framed these sentences every word was weighty with meaning—every idea had been consecrated with the blood of a patriot—some of their kindred had died for them on the walls of Londonderry, in resistance to the divine right of kings to govern without the consent of the people; others had ridden with Cromwell

at Naseby or Marston Moor, roughshod over the claim of the king to suspend the laws of the people enacted by their representatives. They are at once the epitaphs on the tombs of despots, inscriptions on the monuments of those who suffered and died to establish them, and beacon lights for those who should come after them.

Geologists have told us the beautiful story of the tiny marine insect which, laying its foundations in the great deep of the ocean, through countless ages, but with unremitting industry and tireless patience, slowly built up the lovely coral island, which, emerging from the great waters a seemingly huge mass of mud, soon by the light of the sun and the beneficency of climate, became the loveliest garden and most delightful home of man. So these great principles of human liberty, the right of the people to form and control their own government, was the slow process of time, gradually emerging from the darkness and violence of middle ages into the sunlight of the eighteenth century and crystalizing in the new world into the most perfect form of government and the happiest political existence ever vouchsafed to any people.

When the Constitution of our government enjoined a frequent recurrence to fundamental principles, it was not an idle expression, a meaningless fulmination, but a solemn injunction to those who should come after them to cherish and guard these principles as the only sure defence of their political salvation; and right well hitherto have the people of North Carolina kept the faith and the memory of their Fathers.

Are we worthy of these great sacrifices? Do we appreciate these great principles, and are we capable of preserving them? Such are, in my humble belief, the questions now submitted to you.

SPEECH OF F. H. BUSBEE, OF COUNSEL FOR THE RESPONDENTS.

The opinion was clearly intimated, indeed was emphatically expressed, during the discussion in the House of Representatives, that lawyers of a political affiliation different from that of the respondents ought not to appear in their defense. The example of the lamented Vance, based upon an entirely apochryphal statement of facts, that he had refused a large fee offered him to defend Governor Holden when impeached, was cited as an example for Democratic lawyers to follow. This statement was made by the speaker in absolute good faith, but he will generally find that he can not safely rely upon the source of information resorted to in this instance.

Those who were at the bar in those eventful days and especially those who, like our honored associate, Governor Jarvis, took no small part in them, know that as Governor Vance had just been elected to the Senate by the same General Assembly, it would have been indecent for him to have appeared upon either side. He was never approached upon the subject. But he gave indisputable proof of his opinion of the action of the Democratic lawyers who appeared for Governor Holden by appointing Mr. W. N. H. Smith, *clarum et venerabile nomen*, to the highest position in his gift—that of Chief Justice of North Carolina. The language of counsel, apparently designed to deter Democratic lawyers from appearing in behalf of the respondents, is an imputation upon the memory of the men who illustrated the nigh courage and stainless honor of the profession in their defense of the accused. In his argument in the Holden impeachment, Mr. Smith said: "He has selected and summoned us from the pursuits of private life, most of us his life-long political opponents, to present to a tribunal, largely of our political faith, the grounds upon which his acquittal of the charges is asked. In this he has exhibited a confidence in the integrity of our profession which his counsel will endeavor honorably to meet."

And again: "With confidence in the manly independence and integrity of a profession that never hesitates in the path of duty, he has sought the counsel and aid of a political foe. That profession represented in us—whatever of obloquy and reproach may attach to the faithful discharge of its trust, whatever outside popular clamor may assail—in our conduct of the defense will vindicate and assert its true dignity and its just claims to the unimpaired confi-

dence of the virtuous and good. We will not falter in our course nor forfeit the confidence which has been reposed in us."

When the violence of partisan denunciation was poured out upon the heads of the Republican lawyers who prosecuted Andrew Johnson, Mr. Evarts stood erect amid the storm, and bravely set forth the duty of an American lawyer in the following language: "The right of respondent to appear by counsel of his choice makes it as clearly proper, under the obligation of a liberal profession, and under the duty of a citizen of a free State, of sworn fidelity to the Constitution and laws, that we should attend upon his defense. For no man can be familiar with the course of the legal struggles of law, of government, of liberty in the world, not to know that the defense of the accused becomes the trial of the Constitution, and the protection of the public safety."

Content with these examples of a courageous performance of duty, and omitting hundreds of others that might be cited; mindful of the oath of an attorney taken at the outset of our professional lives; zealous of the independence of the judiciary and the liberty of the citizen, the counsel for the respondents will not be moved from the path of duty. We are willing that the people of North Carolina should judge this day between the lawyers who are representing those of an antagonistic political faith, standing steadfast in the defense of an endangered judiciary, and those who would condemn us in advance for the performance of our duty as lawyers. We acquit the Managers of any responsibility for the attacks of a reckless journal.

And so, Mr. President, I enter upon the performance of my humble part of the defense of the three Judges who are brought before the bar of the Senate to answer for their official conduct. The name of one is carefully omitted from the articles, and I can well understand the feeling which prompted the chief Manager to exclude it. His long and intimate association with the late Chief Justice Faircloth would naturally make it painful for the Manager to bring his name into this trial. But the dead Chief Justice was a courageous and upright man, not of pre-eminent ability, but faithful as he saw the truth. In this hour of trial of his associates he asks no exemption at the hands of anyone. He will accept none. His shadowy form takes his seat before this august tribunal, in that vacant chair, shirking no responsibility, not even pleading death as a release. Your verdict as to them will be a verdict as to him; if their lives are to be blighted, then let his memory also be damned to the remotest generation. Strike out his disgraced name from the list of benefactors of your schools and colleges, and let us reverse the saying of Solon, for no man hereafter should be called happy, even after death.

My life has been spent in the practice of my profession, and I have been turned aside neither by the attractions of business or allurements of politics. Believing that by this prosecution my dear mistress, the law, has been assailed in her very temple, I am here to do her feeble, but loyal service.

> "Law doth preserve the stars from wrong,
> Through it the eternal heavens are fresh and strong."

THIS IS A POLITICAL PROSECUTION.

In very truth the fact that this prosecution was avowedly instituted for political objects, and to prevent apprehended dangers, rather than to punish past offences, was not concealed in the House of its birth. It was repeatedly and boastfully asserted upon the floor of the House of Representatives by the advocates of the passage of the resolution of impeachment then pending. Some of those who candidly announced their policy, are now Managers of the impeachment.

It must be remembered that while Senators have been twice sworn to try this cause under the law and according to the evidence, no especial oath was required of the members of the House. It is true, they were acting under their general oath as members of the House, and I expressly disclaim any criticism upon their truth and good faith. But it can not be disguised or denied that the Democratic members were appealed to in language eloquent, bitter and reckless to pass the resolution of impeachment for party purposes. This fact the published speeches unmistakably show. The advocates of impeachment repeatedly described the House as a grand jury, one of them, who is now a Manager, saying: "We are here in the capacity of grand jurors, and when we have found the facts, we can not escape the responsibility of our oaths." The House, then, was a grand jury, compelled to act upon the evidence presented before them, and obliged to confine themselves to such evidence. The impassioned orator who was the author of the resolution, and who is now a Manager, in his concluding argument began by saying, with emphasis and dignity, "it is not a party matter and should not be decided upon a question of politics. It should be considered upon a higher plane than that."

Yet, within a few minutes thereafter, while he was presumably discussing the question whether two Justices of the Supreme Court ought to be impeached for a supposed unlawful action in regard to the issuance of a writ of mandamus, this non-partisan grand juror thus continues:

"That serpent that had crept in secrecy and filth and slime for thirty years in this Commonwealth, in 1895 and 1897 raised for the

first time its head in this capitol and licked out its forked tongue of fire and poison and ruin." And the reporter says: "This statement was greeted by prolonged applause." Respect for the future leading counsel in this prosecution might well have tempered the violence of his metaphor. If all the politicians who were with the dominant fusionists in 1895 and 1897 come under the general designation of "serpents," our friends, the Managers, and their counsel might well pose for the group of Laocoon.

The moderate grand juror who had just asked the House to act without reference to party, then continued a vigorous eulogium upon the application of heroic remedies, saying: "But for heroic action we would not be here. I will ask the gentleman from Scotland how was it that only two votes were cast against the amendment in his county, if it were not on account of the heroism of the men of Scotland?"

I will leave it to the Senate to ascertain what the speaker meant by "heroic action." It seems to me to admit of only a single interpretation. If my interpretation is accurate, I must be pardoned for expressing my unqualified dissent from any statement that the magnificent victory of 1900 was due to any action which suppressed the minority vote. I believe the victory was an honest uprising of the people, and not heroic action shown by interference with a free ballot.

Urging the application of this remedy before the House, the speaker proceeded: "The hour has come when we must pull down from the high places the men who would destroy the work that the people of North Carolina have accomplished. Yes, I for one am willing to apply the heroic remedy."

"Pull down!" Is that the language of a juror? And to "pull down" for what offense? Nothing that the respondents have done; all pretense about a wrongful issuance of writ is thrown aside; and the true reason given is that the member was apprehensive that the Judges "would destroy the work that the people of North Carolina had accomplished."

I deny advisedly, emphatically and by authority, that any living man has a right to speak for the respondents concerning their views on their future action upon any question that may come before him. It is unjust, unauthorized and without precedent in any stage of a judicial trial.

The respondents are now in a regularly constituted Court, breathing the pure atmosphere that, thank God! has never ceased to pervade a North Carolina court of justice. At the threshold of this tribunal, the obligation of party should fall away as did the burden from the back of Bunyan's pilgrim, at the foot of the cross.

No language of mine could add anything to the force of the obligation resting upon the Senators to disregard the appeals of party consideration, if they could only be conscious of the influence. But when it is most potent, the person affected is most unconscious, as a traveler sinking to his death sleep in Arctic snows.

As was said by Mr. Rodney in the Peck impeachment:

"Party, it is true, is a spirit of so subtle a nature as to diffuse itself almost imperceptibly over the human mind; it frequently pervades the system without being felt, and sometimes warps the judgment when least suspected.

"Against the influence of this spirit I need scarcely caution the Senate. It can not approach within the pale of this Court, or enter these hallowed walls."

To emphasize the contrast between an impeachment, almost avowedly undertaken because of a supposed party necessity and the high motives that should control an impeaching body, the language of Judge Spencer, of New York, one of the Managers of the impeachment of Judge Peck, deserves to be quoted:

"The House of Representatives, after a patient and full examination, came to the resolution to impeach Judge Peck, by a very large majority; and the record will show up an absence of all party feeling. Could I believe that that baleful influence had mingled itself with, and predominated in that vote, no earthly consideration could have prevailed on me to appear here as one of the prosecutors of this impeachment. I have no language to express the abhorrence of my soul at the indulgence of such unhallowed feelings on such a solemn procedure."

Mr. Story, in his admirable work on the Constitution, speaking from the standpoint of a writer and expounder of the law, says of the power of impeachment:

"The power partakes of a political character, and on this account it requires to be guarded in its exercise against the spirit of faction, the intolerance of party, and the sudden movement of popular feeling."

It was in the Johnson impeachment trial that the Republican Senators who felt called upon to vote against articles which had passed the House by the vote of a majority of their political friends, gave forth the clearest utterances upon this theme. All honor to the memories of these courageous patriots who, at a time when the passions enkindled by the war were still glowing, so nobly withstood party clamor and outside pressure.

The great difference, however, between that impeachment and this arises out of the Republican clamor against the President then, and the almost universal condemnation of this present pros-

ecution among the conservative Democratic citizens of the State to-day. But you have no right to be influenced by the universal feeling against this prosecution, any more than you should listen to a popular demand for conviction.

Upon this subject, Senator Fessenden said: "To the suggestion that popular opinion demands a conviction of the President on these charges, I reply that he is not now on trial before the people, but before the Senate. In the words of Lord Eldon, upon the trial of the Queen, 'I take no notice of what is passing out of doors, because I am supposed constitutionally not to be acquainted with it' The people have not heard the evidence as we have heard it. The responsibility is not on them, but upon us. They have not taken an oath to do impartial justice according to the Constitution and the laws. I have taken that oath. I can not render judgment upon their convictions, nor can they transfer to themselves my punishment if I violate my own."

Senator Trumbull, of Illinois, said:

"To do impartial justice in all things appertaining to the present trial, according to the Constitution and laws, is the duty imposed on each Senator by the position he holds and the oath he has taken, and he who falters in the discharge of that duty, either from personal or party considerations, is unworthy his position, and merits the scorn and contempt of all just men." "Unfit for President as the people may regard Andrew Johnson, and much as they may desire his removal, in a legal and Constitutional way, all save the unprincipled and depraved would brand with infamy and contempt the name of any Senator who should violate his sworn convictions of duty to accomplish such a result. Once set the example of impeaching a President for what, when the excitement of the hour shall have subsided, will be regarded as insufficient causes, as several of those now alleged against the President were decided to be by the House of Representatives, only a few months since, and no future President will be safe who happens to differ with a majority of the House and two-thirds of the Senate, on any measure deemed by them important, particularly of a political character. Blinded by partisan zeal, with such an example before them, they will not scruple to remove out of the way any obstacle to the accomplishment of their purposes, and what then becomes of the checks and balances of the Constitution, so carefully devised and so vital to its perpetuity? They are all gone. In view of the consequences likely to flow from this day's proceedings, should they result in conviction on what my judgment tells me are insufficient charges and proofs, I tremble for the future of my country. I can not be an instrument to produce such a result; and at the hazard of the ties even of friendship and affection, till calmer times shall do jus-

tice to my motives, no alternative is left me but the inflexible discharge of my duties."

That great lawyer and trained statesman, Reverdy Johnson, called the Senate to a high plane of duty, in the following language:

"It has also been said by some inconsiderate persons that our judgment should be influenced by party consideration. We have been told in substance that party necessity requires a conviction. These appeals are made evidently from the apprehension that a Senator may conscientiously be convinced that the President is innocent of each of the crimes and misdemeanors alleged in the several articles, and are intended to force him to a judgment of guilt. No more dishonoring efforts were ever made to corrupt a judicial tribunal. They are disgraceful to the parties resorting to them, and should they be successful, as I am sure they will not, they would forever destroy the heretofore unblemished honor of this body, and inflict a wound upon the Constitution itself which perhaps no time could heal."

Senator Grimes, in the last days of his useful life, brought in upon a couch of suffering, to give his vote upon the articles, said: "Nor can I suffer my judgment of the law governing this case to be influenced by political considerations. I can not agree to destroy the harmonious workings of the Constitution for the sake of getting rid of an unacceptable President. Whatever may be my opinion of the incumbent, I can not consent to trifle with the high office he holds. I can do nothing which, by implication, may be construed into an approval of impeachments as a part of future political machinery."

Senator Fowler thus stated clearly the position of a Senator sitting as a judge and a juror in a court of impeachment: "His position is one of personal responsibility; he can neither shun it or escape it in any way, and is no more bound by the wishes and purposes of those outside of the Court than is a juror or a judge. Any efforts to bias or influence his judgment by threats or appeals to his personal prejudices or party affiliations or demands, are not less pernicious to the ends of justice than personal violence or bribery to accomplish the same results."

It is to be observed, Senators, that those who are not acting under the solemn obligation of an oath, those who feel no responsibility, save a desire for supposed party advantage, are sometimes swift to advise others to pursue a doubtful course to attain a desired end. Is this a partisan prosecution? I will leave the answer to your own consciences. "Gird up your loins like men," and answer me. If the respondents were of the same political faith as the present majority in the House and Senate; if White was of the

same party; if the General Assembly of 1899 had been of an opposite party, do you believe that resolutions of impeachment would have been presented? I hardly think any honest man will say that he thinks the House would have impeached Justices of their own party affiliation under the circumstances of this case.

Before entering into a discussion of the underlying principles of law and justice which should control the Court in dealing with this charge, it will be well to determine what are the facts concerning the conduct of the controversy between White on the one hand and the Auditor and Treasurer upon the other. They are not seriously controverted. Neither the Treasurer nor the Auditor were in any way connected with the case of White against Hill, which had been previously decided by the Supreme Court. This was a final decision that White was entitled to the office and was an officer *under the act of 1899*. White did not surrender his office when the act of 1899 was passed, but continued to exercise its functions until a controversy arose concerning the possession of the steamer "Lily." This forced him to bring suit against Hill and the other oyster inspectors named in the act of 1899. The case went to the Supreme Court, and it was there decided that White was lawfully in office as Shell-Fish Commissioner, or Chairman of the Board of Shell-Fish Commissioners. From that time he continued in the fullest exercise of the duties of his office, and by himself and his associates he had caused to be paid into the Treasury considerable sums of money, arising under the operation of the act of 1899. By section 9 of that act, it was provided that the Treasurer should keep the fund arising under the act separate and apart from the other public funds in his hands, and should pay the expenses of carrying out the act, including compensation allowed by the Board to its employees, etc., upon the warrant of the Auditor, which warrant was to be issued by the Auditor upon the certificate of the Secretary of said Board, etc. This section is to be construed in connection with the prior legislation of section 14, act of 1897, which provides that all moneys in excess of five hundred dollars derived under the act of 1897, and in the hands of the State Treasurer on the last day of November in each year, should be transferred by him to the public school fund. Construing these two sections together, it is too plain for argument that the amount to be transferred to the school fund is the balance left after paying the expense of the Shell-Fish Commissioner. A reasonable man will hardly contend that when the expenses and salaries arising from the operations of the act of 1899 remain in the Treasury, because the Auditor is doubtful as to his right to audit the claims as they were presented, and the Treasurer is doubtful as to his duties to pay, that the entire fund, less $500, should automatically be transferred to the school

fund. The Auditor did not feel that he ought to pass upon the construction of chapter 21, which provided that the Treasurer should pay only those who were authorized under the act of 1899, and of course the Treasurer would not pay any demand of White's until the account had passed through the hands of the Auditor, and a warrant had been issued for its payment. The fund then remained in the hands of the Treasurer, appropriated by law to pay the salary of the Shell-Fish Commissioner, and the legitimate expenses of the execution of the law. The Treasurer awaited the time when, with no possible danger to his bond, he would be safe in making a payment of the salary and expenses of White. He instructed his counsel that the matter must be passed upon by the Courts for his protection, and he offered in every way to facilitate the decision. The Supreme Court, speaking through Judge Clark, had blazed out the pathway for the Treasurer to take, in *Bank v. Worth*, 117 N. C., 155: "Should the Treasurer have reasonable doubt, he should consult the Attorney-General, or, if he think proper, refuse payment, as in this case, and let the matter be determined by the Court."

Not the slightest objection was suggested in the foregoing case, nor in any other case in the North Carolina Courts, to the remedy sought—a mandamus against the Treasurer. There were but two questions really at issue in the White case—first, was chapter 21 a valid inhibition against the auditing and payment of the salary and expenses of White? And secondly, was the salary $900, as allowed by the act of 1897, or $400, as allowed under the act of 1899? The decision in White against Hill had already been rendered. Neither Hill nor any of his associates were in office, and White was carrying out the provisions of the law, bringing in revenue to the State, and in every other respect executing in full the provisions of the act of 1899. The Treasurer was receiving money which was earned by the labors of an officer, after that officer's title had been passed upon by the highest Court, and duly affirmed. He did not think he was called upon to interpose needless delay or fruitless objections to paying White his salary, if in law he was entitled to it. He sought the instructions of the Court, clear and unmistakable, both as to the rate of salary, and whether the statutes left White in a position to receive it. His counsel thought that after White had been adjudged to be the lawful officer, performing his duties under the act of 1899, he was entitled to the salary, and as an honest man the Treasurer did not think it was his duty to instruct his counsel to throw obstacles in the way of its payment, if, under the law, White was entitled to it. It was perfectly immaterial in what county the action should be brought. As White was a citizen of Perquimans County, and as the First District would be the first one called in the Supreme Court at the end of the docket,

no reason was apparent why the case should not be constituted in Perquimans. As the facts were agreed upon, they might have been submitted to the Court by complaint and demurrer, or by a case agreed, or in the form of a controversy without action. As the latter method would involve the parties in the least expense, and as the three methods were practically the same, this was agreed upon. The counsel had before them the case of *The Granville County Board of Education v. The State Board of Education*, 106 N. C., p. 81, in which the action was brought in Granville by ex-Judge Graham, now one of the Managers, and the case was heard and decided in that county, although it ought regularly to have been begun in Wake, and an effort was made to remove it. The motion was not made in time, and was properly refused.

It is true that a technical objection might have been made to the joinder of the Treasurer and the Auditor, as was done in the case of *Boner v. Adams and Jenkins*, 65 N. C., p. 639. But under *Moore v. Jones*, 76 N. C., 188, as the acts which were sought to be commanded were a series of acts relating to the same matter, perhaps it could have been done. However that may be, as both the Auditor and the Treasurer desired the instruction of the Court, and the protection of its decision, to escape any possible liability upon the Treasurer's bond, it was deemed more economical and equally satisfactory to submit this controversy in a single action. I am at a loss to conceive any good which could have been accomplished by a separate action against the Treasurer. It was the object and intent of the controversy that the Treasurer and Auditor might both be informed of their duties. Should the Auditor audit and the Treasurer pay White's salary and expenses? There was nowhere any concealment of the fact that the money came into the Treasury by the labors of White and his associates, and was there ready to be paid out to the legitimate officers if the law authorized and required it. No possible good could have been subserved by reason of a technical objection to parties, and it would seem that an objection of this sort could not be made for the first time in the Supreme Court, when the parties were content, for the reasons already given, that their rights should be passed upon in a single case. It was not possible, nor would it have been legal for the parties themselves to have agreed upon the amount for which the Auditor should issue his warrant. The mandamus sought is not for a money demand, in which event the amount would have been settled by the judgment. It is simply to require the Auditor to audit the account of White for salary and expenses, the principles which should govern him being settled by the Court.

In view of the question asked by a Senator, it may be well enough to say that the action is not like a suit upon a debt due by

a county, or other municipal corporation, in which the Court must fix the amount by judgment before a writ can issue. The relief demanded is solely that the Auditor shall audit the account, and when audited, that the Treasurer shall pay. The judgment is satisfied when the Auditor audits, and if he issues a warrant, when the Treasurer pays it. It is not a case for a reference, nor one in which a judgment could be entered in Court fixing the amount. This would be an interference with the duty of the Auditor acting judicially.

Even in the very case cited by the dissenting Justice, in the opinion in *Boner v. Adams*, 65 N. C., 639, in which the mandamus was refused, Mr. Justice Reade sets out a proper order for the Court to make, which is the one in effect made in this cause: "The most this Court would do would be to order the Auditor to examine the claim and to allow it if he thought it correct, and in that event to issue his warrant for it if in his opinion there is sufficient provision of law for its payment." To the same effect is *Bank v. Worth*, already cited. This is what the judgment of the Court in *White v. Auditor* prescribes. It directs the Auditor to audit the claim upon the basis of a salary of $400, actual expenses, mileage, etc., following the terms of the act, and to draw a warrant accordingly. For the protection of the Treasurer, the judgment further provides that when such warrant is drawn the Treasurer shall pay it, it having been admitted that the money was in the treasury. Although Judge Starbuck, in the Court below, decided that the salary was $900 a year, and although this opinion is endorsed by Justice Montgomery, by the argument of the Treasurer's counsel the salary is reduced from $900 to $400 per year, and about $1,000 is thus saved the State.

It would seem rather singular that this action taken by the defendants, resulting in so large a loss to White and a saving to the State, should be regarded as taken in the interest of White.

The opinion in the Granville County case already cited, clearly sustains the jurisdiction to issue the mandamus against the State Board of Education. It is held that it is a corporation rather than an agency for the State. But the Court, speaking through Clark, Justice, says: "Even were not this beyond question, as the proceeding is to compel public officers to discharge a mere ministerial duty not involving official discretion, the action will lie."

No allusion was made in the argument of the case to any question concerning the legality of the issuance of the writ of mandamus. Nothing was further from the minds of counsel that the case would involve such question. The action was brought in the form of an action for mandamus, because that was the only action which would lie; but what was sought was simply the opinion and instructions

of the Court. These were clearly given, and the officers were prepared to follow the opinion and judgment. This was done in *Cotten v. Ellis*, in *Bailey v. Caldwell*, and in *Granville Board of Education v. State Board of Education*. In *Shaffer v. Jenkins*, 72 N. C., 275, Judge Rodman draws a distinction between cases brought *in invitum*, against a resisting officer, and those brought merely to obtain the opinion and instructions from the Court. It has pertinently been asked if any instances can be shown of such writs issued to State officers. Very few, I am sure, because it is not to be presumed that any State officer will disregard the instructions of the Court, or require a peremptory writ to force him to do so. Why, then, was it done in this case?

The evidence discloses: After the Court had made its final deliverance and the law was declared, it became the duty of every law-abiding citizen, and especially parties to the action, to yield obedience. The Treasurer and Auditor were ready to carry into effect the judgment. But as soon as the opinion was filed, the dissenting Justice, Clark, went to see the Treasurer, whether invited in his office or not is immaterial, and threatened him with impeachment if he should follow the direction of the Court. Previously, this Justice's threats of impeachment had been confined to his associates on the bench; now he invades the executive department and tells the Treasurer that he will be impeached and his bond sued if he shall carry out and obey the judgment against him. What could the Treasurer do under these circumstances, except to wait until the writ issued, and no discretion should be left him?

After having thus threatened the Treasurer and prevented him from doing as he intended, and as has been done in all similar cases, the same Justice thus innocently writes in his protest:

"After the lapse of five months, the defendants not having followed the opinion, which it was said in the opinion the defendants wanted," etc.

This is characteristic and refreshing. The Associate Justice has urged the Treasurer not to pay, without a writ or even with it, and had coolly suggested that if he did so he would surely be impeached and his bond would suffer loss. With this judicial opinion given by a friend in whom he at that time had confidence, is it to be wondered at that the Treasurer concluded not to pay. So the Justice was justified in saying in his subsequent protest that the defendants had not for five months followed the opinion.

In view of the length of time that has already been devoted to the discussion of this case and the various opinions filed therein, I do not think it necessary to devote further time to the discussion of the facts of the issuance of the writ. The burden of the dissenting opinion seems to be that the Court could not direct the Auditor

to issue the warrant, but that the furthest it could go would be to order the Auditor to report the claim to the General Assembly. For this it cited an extract from *Boner v. Adams*, 65 N. C., 643, not quoted directly from the opinion, but taken from a quotation in the case of *Koonce v. Commissioners.*

The dissenting Justice had previously quoted directly from *Boner v. Adams*, but the second quotation is made at second-hand. Without meaning the slightest imputation upon the dissenting Justice by whom the quotation was made from *Koonce v. Commissioners*, upon a scrutiny of the case, it will be found that the language quoted from *Boner v. Adams nowhere appears in that case.*

Judge Reade said in *Boner v. Adams:*

"The most this Court could do would be to order the Auditor to examine the claim and to allow it, if he thought it correct; and in that event to issue his warrant for it if, in his opinion, there is 'sufficient provision of law for its payment.' "

Judge Clark quotes from *Koonce v. Commissioners*, language purporting to have been quoted from *Boner v. Adams:*

"The most this Court could do would be to order the Auditor to examine the claim and report the fact with his opinion to the General Assembly."

The difference between these is vital, and goes to the very bottom of the controversy. All that the Court orders in the White case is entirely in accordance with the correct quotation of Judge Reade's opinion.

The next inexplicable thing about the dissenting opinion of May 22d, is that it is utterly contradicted by the letter accompanying the protest filed in October. The dissenting opinion is based upon the fact that the Court has directed a mandamus to issue. In *White v. Auditor*, 126 N. C., at page 602, Justice Clark says:

"*It directs its mandamus* to issue to the Treasurer to pay that sum to the plaintiff"; and later, "Should the Treasurer, under legal advice, deem the action of this Court in excess of its constitutional powers, will the Court put him in jail for disobedience?"

Yet in the letter of October, the Justice instructs the Clerk not to issue the writ because "It is not authorized by the former opinion of the Court"!

(Here the Court took a recess until Monday, March 25, at 10 a. m.)

MONDAY, MARCH 25, 1901.

MR. PRESIDENT AND SENATORS:—I shall not take advantage of the indulgence extended to me by the adjournment on Saturday, but shall confine myself without repetition strictly to the original line of argument which I have attempted to mark out

for myself. At the close of my remarks on Saturday, I was attempting to show that the issuance of the writ of mandamus by the Clerk was in accordance with the usual practice of the Court, and was in strict accordance with the law. I understand that one of the able counsel for the Managers has challenged counsel for the respondents to answer whether or not the judgment of the Court authorized and directed the issue of that writ. But for that enquiry, and but for the repetition of the statement by more than one counsel, I should not have thought the proposition could be disputed. According to the testimony of Colonel Kenan, the Clerk, and of the two respondents, the issuance of the writ of mandamus would regularly follow from the opinion of the Court and the judgment entered in accordance therewith. The judgment of the Superior Court ordering a mandamus was modified and affirmed. It is not at all necessary, and it is not frequently done, that the language of the judgment shall state "let the writ issue." Just as in an ordinary judgment, the language being "the plaintiff shall recover the sum of an hundred dollars and costs of the defendant," no lawyer would say that the judgment should contain the words "let a writ of execution issue." So in a judgment rendered in an action of mandamus it is not necessary to say "let the writ issue." When the judgment below is affirmed, and the judgment entered in the appellate Court directing that the debtor shall perform certain acts, the office of the writ of mandamus is merely that of a message which the Court sends to the defendant through its Clerk, requiring him to carry out the judgment. It is entirely analogous to a writ of execution which is made to carry out the judgment in an ordinary case by forcing defendant to pay. The Court filed its opinion and rendered its judgment, and it appeared that the opinion had already been certified to the defendants that the plaintiff was entitled to receive his salary and expenses as provided in chapter 19, Acts 1899; and the judgment decreed that the plaintiff is entitled to the salary and fees, and that the same be paid out of the oyster fund; that a certificate and warrant shall issue. This was a judgment that a writ of mandamus shall be issued in accordance with the opinion in this cause. The opinion of the Court was made a part of the judgment, and the direction was that the mandamus should issue. The Clerk testified that it was in accordance with the usual practice to issue a writ upon such an opinion and judgment, and but for objection made by Justice Clark, the writ would have issued. Fortunately, we are not without authority upon the subject, and an authority which I hope my friends upon the other side will admit to be conclusive. We have shown that three of the Justices said that the judgment directed its issuance, and the other also said so in substance; and now as a witness

I call the dissenting Justice, Clark. I read from the dissenting opinion in 126 N. C., at page 602. This opinion was filed on the 22d of May, long before the trouble arose in October following: "The Court has audited this claim, and holds it fixed not at the $900 allowed the Chief Inspector by the act of 1897, but at $400, which is the sum allowed each of the seven Commissioners for discharging that and other duties under the Act of 1899. It directs its mandamus to issue to the Treasurer to pay that sum to the plaintiff, which is 'process in the nature of an execution' to enforce collection out of the State." If all the Justices say it, and the Clerk swears to it, is the Senate to listen patiently to an argument that the respondents should be removed from office because they take the same view of the judgment and opinion that the dissenting Justice does?

And further, on page 608, Justice Clark says: "Should the Treasurer, under legal advice, deem the action of the Court in excess of its just constitutional powers, will the Court put him in jail for disobedience?"

So that when the Court has so found, and when the Clerk has sworn, that the action taken was in accordance with the practice and that the writ would have issued but for objection made to its issuance by the dissenting Justice; and when Judge Clark expressly says in his dissenting opinion that the Court has directed a mandamus to issue, can our friends be heard to say that the respondents are impeachable for taking the same view of the law? So far as the charge is made that the respondents attempted to throw the responsibility on the Clerk, I think that contention has been abandoned; or, if not, it is so clearly met by the facts that it will be abandoned by the Senate, if not by the astute counsel for the Managers. The respondents do not say that they did not order the writ to issue. They have said repeatedly that when they delivered the opinion on the 22d of May, and the Chief Justice signed the judgment, the Court thereby ordered the writ of mandamus to issue. This is the foundation for their decision in October that they had no judicial cognizance of the matter; that the only way in which any question could arise before them was for the Clerk to refuse to issue the writ, and for that refusal to have been made to appear to the Court by affidavit in the proper way. They have said, and the Clerk confirms it, that after the case had been removed from the docket, and the judgment directing the writ to issue, the case was not then before the Court, that it was not upon any docket, except the execution docket, and that it could not come before them except in a regular legal way. This is in effect shown by the implied assent of the entire Court, because when Mr. Harris, counsel for

White, makes his motion in the Supreme Court, he is asked: "Have you any written motion?" And when he answers in the negative, "Have you gone to the Clerk and applied for the writ?" "No." "Then go to the Clerk for the writ of mandamus, or for any other writ to which you are entitled; the proper place to apply is to the Clerk."

All of us know that, after a judgment has been rendered and entered, there is no case before the Court except upon some proper process. If, for instance, the Clerk had refused to issue the writ, then the plaintiff could have brought it up before the Court by affidavit. Then there would have been something before the Court. The Clerk, as he had a right to do, came before the Justices and said, "What must I do?" They said, "Until the matter is before us, you can not come and constitute a case before us by a request for instructions; and until it is before us, we can not give an opinion as a Court. But there are three of us who advise you that it is your duty to issue the writ under the judgment already entered." The Clerk is therefore informed as to his duty by three of the Justices, and one of the dissenting Justices says: "That settles it." No question as to the responsibility of the Clerk can be involved in this case. If the contention of our friends is right and the advice to issue the writ was a judicial act, they admit that they gave it. The uniform and unbroken line of decisions, however, without a single exception, is to the contrary.

But it is not material whether the order was made on the 22d of May by the judgment, or afterwards by way of advice of the majority of the Court; in either event the majority of the Court was responsible for the advice, and have sought to shirk no responsibility for the judgment, or anything connected with it.

I have spent perhaps unnecessary time in proving that this judgment in the White case directed the issuance of the writ, and we have challenged the Managers to produce a single authority to the contrary. When the judgment was entered on May 22d, the action of the Court was complete. The issuance of the writ was comparatively of small moment. In this case I showed on Saturday, and will not repeat, that the only thing the defendants wanted was the direction of the Court. They received the instructions and were ready to obey it; but as soon as the opinion was filed they were told by a dissenting Justice: "If you take one step in this matter, you will be impeached." Having thus stopped the Treasurer from obeying the direction of the Court, when the claim comes up again in October, the dissenting Justice filed his so-called protest. I have already cited his language, in which he taunts the majority because the Auditor and Treasurer have not followed the opinion of the Court. How could they have ventured to do so, when they were

threatened with impeachment, suits upon the bond of the Treasurer and unnumbered evils? "These defendants do not seem to have followed your opinion," says the dissenting Justice. Like the walrus to the oysters, in "Alice in Wonderland:"

> "I weep for you, the walrus said;
> I deeply sympathize."

A case is cited by the Managers and their counsel, and much is attempted to be made of it; I refer to *Garner v. Worth*, 124 N. C. The prosecution contends that the Justices should not have issued or have directed the issue of the writ, because the questions involved had been decided in *Garner v. Worth*. Let us see what the facts are in that case. I asked the Clerk to send the original record, which contained the first draft of the opinion, which Judge Clark delivered; the second draft of that opinion, and the third draft containing the omission of a sentence. But it is hardly necessary to have this read, as it will consume too much time to consider it; it is important only to show upon what points the case was actually decided. The opinion seems to have been certified to the reporter in a form different from that in which it appears in the reports, because you will see that the case in the head-notes states propositions of law apparently not raised in the body of the opinion, and which I do not care to press here. I wish to state in advance that I am not criticising either the most excellent plaintiff, the Clerk of Carteret County, or the honorable counsel engaged in the case. I do say that no counsel engaged in any cause has a legal right, according to the ethics of the profession, and certainly the honorable gentlemen engaged in the cause would not do it, to ask a Superior Court Judge to violate or encroach upon the Constitution of North Carolina in the slightest degree. No counsel in the State in the legitimate practice of his profession, has any moral or legal right to ask a Superior Court Judge to issue any process, if that counsel believes, or even suspects, that it is not entirely warranted under the Constitution. Now what was that case? Inadvisedly or unwisely the State of North Carolina had brought a large number of suits in Pamlico and Carteret counties to revoke certain entries of oyster lands made by citizens of those counties. It was adjudged that the State had no ground for the action; the State took nonsuits and judgments for costs against the plaintiff, the State, were entered. These judgments for costs were presented to the Auditor, who issued his warrant in favor of Garner for $757.00. The Clerk, who was the plaintiff, taxed the costs. For every dollar of costs he was legally entitled to, he taxed two dollars. I admit that the Clerk did this in perfect good faith. After the Clerk had made that taxation of the costs,

amounting to $757.00, the Supreme Court decided in a series of cases that came before them from Pamlico County, that such taxation of costs was erroneous. The opinion in *Blount v. Simmons* decides that the county ought not to pay, and the State ought to pay the costs; but that instead in a test case, of $13.00 costs taxed, the amount should have been $6.00. The costs of Mr. Garner, the Clerk, were taxed erroneously, just as they were in *Blount v. Simmons*, quoted above. And as is shown by subsequent act, passed by the General Assembly of 1899, the $757.00 should have been less than half that amount, including the Sheriff's fees, as I suppose it did, $357.00; and this was the amount afterwards paid under the resolution of the General Assembly. Now, Garner had the Auditor to issue him a warrant for $757.00, and came to Judge Robinson and presented his warrant. This was the usual action, like *White v. Auditor and Treasurer*, brought by counsel, to have a mandamus issued directed to the Treasurer to make him pay the warrant; the Auditor was not included, because he had already issued the warrant. I infer from the brief of counsel that the allegation of fraud was not contained in the answer, but was set up by affidavit. But the answer alleges that the costs were erroneously taxed, and asked for a revision of the costs. What was the reply of Garner's counsel to that? "Here is the warrant, and, having the warrant, you can not be heard to contradict any part of it, and I am entitled to a mandamus against the Treasurer, directing him to pay me $757.00." Judge Robinson issued a peremptory mandamus ordering the Treasurer to pay the full amount, upon the motion of as reputable and as honorable counsel as this State affords. Who were they? It is not material, but that you may know I have not underestimated their merit, the counsel whose names are appended to the brief filed in the Supreme Court are F. M. Simmons, Jas. H. Pou, William R. Allen and William T. Dortch.

This case of *Garner v. Worth* seems to be the case the prosecution chiefly relies upon, and yet here we find a peremptory mandamus issued by the Superior Court Judge, at the instance of counsel, and afterwards upon appeal endorsed by the counsel, whose names I have read. The Supreme Court is asked to issue a peremptory mandamus against the Treasurer to pay a warrant, which, the Supreme Court had, in a previous decision, in effect, said contained double the amount of the costs properly due. The argument of this case was able, and it was put upon a single ground. The question was: "Is this a claim against the State?" It was argued by counsel fairly upon the ground that an important and essential element distinguishing the warrant, sued on from a "claim against the State," is that the State should, through its Legislature, give its assent to paying. The brief cites with approval an Alabama case, in which it was held that the petitioner was entitled to a mandamus to compel pay-

ment of a salary of two thousand dollars to the Marshal of the Supreme Court, although the Legislature only appropriated one thousand dollars. Our Court has never gone this far. Then, in the concluding argument, the brief says: "We insist that the State having at least consented to become liable for costs under section 356 of The Code, that such liability, when incurred in an attempt to recover property claimed by the State, is a legitimate expense of the State Government."

* * * * * * *

"If there is provision for the payment of the warrant, as we insist, then the duty of the Treasurer is ministerial and mandamus will issue to compel the performance of this duty. This does not seem to be disputed in the brief of the appellant."

The cases of *Cotten v. Ellis* and *Railroad v. Jenkins* are cited in the brief. The point in that case, therefore, was, in many respects, the same as the point in the case of *White v. Auditor*, except that the Treasurer resisted the payment of the Garner warrant, and was using every method in his power to keep from paying it, and the different facts in regard to the appropriation. In the White case the Treasurer said: "I am not posted as to the law, and I come before the Court asking to be instructed as to the rate of salary, and if there is an appropriation, does the Act of 1899 prevent me from paying the warrant?" I shall not repeat the argument of yesterday upon that question. I attempted to show that White was authorized to perform the duties of his office under *White v. Hill*, and under *White v. Auditor* that White was decided to be performing the duties of his office, under the Act of 1899. He was paid the salary under the Act of 1899, chapter 19, and, therefore, the prohibition in chapter 21 did not apply. If it was permissible to ask for a mandamus under *Garner v. Worth*, how much greater was the right to ask it under the facts in the case of *White v. Auditor?*

Mr. President, I do not wish to trespass upon the time of the Senate, but in regard to the general law regulating the issuance of writs of mandamus there are two or three positions not heretofore fully presented, which, for the benefit of Senators who are not lawyers, I desire to state. I will be as concise as possible.

What is the writ of mandamus? It has been generally mentioned by the prosecution with bated breath, as if it were a holy document, not to be touched by mortal hands. Formerly it was a high prerogative writ. If anyone required a writ of injunction, to prevent the doing of an act, he went to the Court of Chancery; but if he wanted to command a man to perform any act, he went into the Court of King's Bench and there filed a petition for a writ of mandamus. Generally the Court granted a rule to show cause before it at a certain time, why the writ should not issue. This procedure has been

abolished by our statute, and an action to obtain a writ of mandamus is now begun like any other action, by a summons. The plaintiff files a verified complaint, or both parties waive a complaint, as is done in a controversy without action. If, upon the hearing, the whole matter, both of fact and law, is not settled, an alternative writ is issued, and the defendant is ordered to perform some act, or to show cause why he has not done so. If the law is settled and the facts found or agreed upon, then a peremptory writ is issued or denied in the first instance. Sometimes an alternative writ is issued, as was done in the case of *Tucker v. City of Raleigh*, 75 N. C., 267, when the manner of performance is uncertain. But where the law and the facts are settled by the decision a peremptory writ is issued in the first instance, as is shown in *Lutterloh v. Commissioners*, 65 N. C., 403, and other cases cited.

There are two distinct classes of action for mandamus. One is for a money demand, as was the case in *Garner v. Worth*, which was for the exact amount of the warrant, and the ordinary actions against a town or county for a named amount, due by bond or other instrument. The books are full of such decisions. If a suit is brought for a money demand, then the amount of the judgment must be fixed by the Court, by a jury, or by reference or otherwise. The other class is when the object of the suit is not to recover a definite amount, but to require some one, usually an officer, to perform some ministerial duty. In the White case the relief demanded was not to fix the amount of the recovery, but merely to require the Auditor to pass upon the account. The Court can not control the discretion of the Auditor; all it can say to him is: "Take this claim and pass upon it, and the law which shall govern you in passing upon it is as follows." That was the class of mandamus asked for in this case; the amount demanded nowhere appears in the pleadings. If the mandamus is for a money demand it is returnable to a term of Court; and if not, it is not returnable to a term of Court, but before the Judge in chambers. And yet our friends went to great trouble to prove that Perquimans Court had adjourned!

Now, Senators, we come to the fifth article, which alleges a long continued purpose to defy the General Assembly; that it is not this case of *White v. Auditor* alone which is complained of, but in all the office-holding cases the respondents and their dead associate have been trying to turn Democrats out of office, and to put Republicans in. The Managers declare we will impeach you for that.

It is a most remarkable thing that every time a Democrat is kept or placed in office the Court is applauded by the Democrats, and abused by the Republicans; and that every time a Republican is put in or kept in, every Democrat declares it is monstrous, and every Republican applauds the noble and courageous Court. Would it not

be a very singular coincidence that in all these cases every time a Democrat went in, the Court was right, and every time a Republican went in, it was wrong? There have been a great number of these office-holding cases in North Carolina. When, in 1870, the voters of North Carolina set their seal of condemnation upon the record of the legislative and executive officers who came in power in 1868, the Democrats felt as if their day of power had at last arrived. We felt as if we owned the earth and the fullness thereof. All the State institutions were controlled by Republican office-holders, and the problem for the Democratic Legislature to consider was in what manner they could constitutionally "turn the rascals out."

At that time there was a provision in the Constitution that the appointment of all officers whose appointment was "not otherwise provided for," should be made by the Governor. We determined to "otherwise provide" for them, and the Legislature appointed two gentlemen, whom the Supreme Court afterwards called "Appointers General." One of them was Judge Warren, the father of Hon. Charles F. Warren, of Beaufort, President of the Senate; and the other was a wounded Confederate soldier, then the Speaker of the House, Hon. T. J. Jarvis. And a man had to be of the straightest sect if he received an appointment. In the temper of the times it would not have been prudent to have kept them out of their offices, and they went in. The Governor, Caldwell, proceeded to make his appointments under the Constitution, claiming that the Legislature had no power to provide for their appointment.

These cases are to be found grouped together in the 68 N. C., beginning with People on the relation of *Nichols v. McKee*, *Walker v. Bledsoe*, and *Clark v. Stanly*, and others.

The Supreme Court held that the provision meant, "unless otherwise provided by the Constitution," and not by statute, and turned out every single Democrat and put the Republicans in. The majority could do nothing but sit quietly by in despair; we were the hungriest Democrats ever seen on earth, but it did not occur to any single human being that the remedy of impeachment ought to be invoked. As we get a little older, Mr. President, we may very well look back, and to some of us it seems that things were more conservatively managed then. I believe that in the Grecian mythology it was the duty of Apollo to drive the chariot of the Sun, day by day, along its accustomed pathway in the sky. But when the experienced charioteer, giving way to the importunities of his son, Phæton, yielded the reins of the celestial horses into the untried hands of the youth, every school boy knows the terrible consequences. In Spencer's quaint words, when Phæton presumed—

> "his father's fiery wain,
> And flaming mouths of steeds unwonted wild,
> Through highest heaven with weaker hand to rein,

it was but a short while before he discovered that he was unequal to the task.

> " He leaves the welkin way most beaten plain,
> And, rapt with whirling wheels, inflames the skyen
> With fire not made to burn, but fairly for to shine."

After these cases, in 1871, arising under the Constitution of 1868, there were no more conflicts between the legislative and the executive departments until the advent of Mr. Craig's Fusion serpent, in 1895. The cases arising out of the legislation of 1895 did not involve the principle decided in *Hoke v. Henderson*, but arose for the most part out of defects in attempted legislation, or irregularities in certain elections by the General Assembly. In *Ewart v. Jones*, 116 N. C., 570, the defendant, Jones, did not claim a vested right in the office, but under an appointment of Governor Carr, made subsequent to the election of Ewart. The defendant, Jones, contended that the plaintiff, Ewart, had not been duly elected by the General Assembly, and that it had no right to elect. The opinion awarded the judgeship to Ewart, and was concurred in by Justices Clark and Avery. The learned counsel for the Managers is in grave error in thinking the doctrine of *Hoke v. Henderson* was involved in this case. In *Stanford v. Ellington*, 117 N. C., 158, a contest concerning the librarianship, it was decided that the plaintiff was not legally elected, because a quorum of the General Assembly did not participate in his election. In *Cook v. Meares*, 116 N. C., 582, the Court held that the office of Judge of the Criminal Court of the Eastern District was not in existence at the time Cook was elected, and Judge Meares retained his office. In both these instances the Democrats were successful. In 1896 the Legislature was again controlled by a Fusion majority, and the Governor and the Supreme Court also being Republicans, there was no conflict between the various departments of the government. The majority of the Legislature passed a good many statutes intended to take the control of the asylums away from the Democratic directors and superintendents then in possession, and to place the control in Republican hands. Out of this attempted legislation arose the oft-quoted case of *Wood v. Bellamy*, with which you have had every opportunity to become acquainted during this trial. The Court decided in the three cases, involving respectively the control of the Eastern, Western and Central Insane Asylums, that the officers of the institutions were fully protected from eviction under the doctrine set forth in *Hoke v. Henderson*, and that the Legislature had no power to turn out the incumbents under the statutes passed for that purpose. The Supreme Court, as then constituted, containing a clear majority of Republicans, upheld the validity of the North Carolina decisions, although these pre-

cedents were not in accordance with the decisions of any other State in the Union. The Democrats remained in office.

It may be interesting to recall how the opinion in *Wood v. Bellamy* was received by the press and people of the State. I give the following citations from the *News and Observer*. On April 19, 1897, the editor says: "It is our opinion that when the Court renders its decision they (the asylum officers) will be protected in the *property they have in their offices.*"

When the opinion was actually delivered, the paper said the next morning, April 28, 1897, under the heavy head-line: "The Supreme Court Stops Looting of the Asylums:"

"No decision has been rendered by the Supreme Court in many years which will be as gladly hailed by the whole people as this decision. It is a final rebuke to the abortive attempt to revolutionize the charitable institutions of the State in the interest of self-seeking politicians. * * *

"The people will rejoice and applaud a decision so just and wise and couched in language so plain and terse."

It is hardly necessary to repeat what has been said in your hearing day by day for the last two weeks, that the opinion in these cases rests entirely upon the doctrine of *Hoke v. Henderson.*

No other cases involving the doctrine of *Hoke v. Henderson* came up until Day's case, the opinion in which was rendered on April 11, 1899, and the next morning the same organ declares, "The Court Goes Fusion."

On April 14, 1899, it says (the extract is slightly condensed): "The opinion of Chief Justice Ruffin in *Hoke v. Henderson* is not in line with the best American jurisprudence," and later in the article the editorial quotes "the following extract from *Hoke v. Henderson*, which, before many years, will be overruled," and attempts to show it was the emoluments and not the office which was protected.

Thus you will see that a case which a short while before had been potent to protect the incumbent "in the property" which he had in his office, when the circumstances are changed becomes only a protection to "the emoluments of his office," and in any event "was not in line with the best American jurisprudence," and doubtless would "soon be overruled."

In Day's case, as has been so frequently said, the Court decided that the incumbent was protected in his position under the doctrine of *Hoke v. Henderson*, even though the duties of the office were transferred to three persons instead of one. The other cases, involving the clerkships and the solicitorship of the Western Criminal Circuit, and the case of *White v. Hill*, involving the office of Shell-Fish Commissioner, were based directly upon Day's case.

(Mr. Busbee here discussed the relation of these cases to *Wood v.*

Bellamy, with citations from both cases, and argued that the decision in all these were logically deducible from the case of *Wood v. Bellamy;* that if the Justices who concurred in the decision of the latter cases, were to be visited with punishment of unexampled severity, the Justices who participated in the decision of *Wood v. Bellamy* should receive the same measure of condemnation.) He then continued:

Under the doctrine of probabilities, how can it be possible that the Supreme Court should be undeniably right and their opinions worthy of the highest eulogium in every case in which a Democrat is successful and viciously wrong and deserving of unmeasured denunciation in every case in which a Republican succeeds? It is unnecessary to pursue the discussion of this fifth article at greater length. If anything can be certain in the future, a vote of not guilty upon this article would seem to be assured.

It will be a day fraught with untold evils in North Carolina if the Justices of our highest Court shall be forced to sit trembling in the performance of their important duties under the naked sword suspended by a hair. It is true that the judiciary is the weakest department of the government. It has neither the command of the "reeking tube and iron shard" of the executive, nor does it control the purse as does the Legislative Department. Yet, it is the department of the government which comes nearest to the people in their daily lives. Upon the one hand it is the sole defence of the weak against the exercise of unlawful power; upon the other, it stands as a safeguard to property rights against the ungovernable passions of communism. It has been well said that the main purpose for which governments exist among men, is to secure twelve impartial men in the jury box. The independence of the judiciary, its freedom from partisan assault, the preservation of its good repute among the people, are to be zealously guarded by every patriotic citizen who is interested in preserving the proper balances of government. These have a greater interest than Judges or lawyers. If this independence is to be overthrown by assaults from without, or undermined by the attacks of those within its ranks, the State will feel the wound in every department of government. If those who should be alert to guard with ceaseless vigilance its outposts shall be the first to threaten its autonomy, it portends grave dangers to the public weal.

When the members of a court are performing the most delicate of all the duties which can come before them, that of passing upon the constitutionality of statutes enacted by the Legislature, they should be free from intimidation by the threats of an associate. I have never been able to understand how it was possible for a Judge to avoid passing upon the constitutionality of statutes, when the question is involved in a case regularly before him? Each Judge

has taken the official oath, which has been given in evidence in this cause. He has sworn to observe and support the Constitution and laws of North Carolina and the acts not inconsistent therewith. The chart of government prescribed by the people in convention assembled, from which alone the Legislature derives its power, is the organic law which must be paramount. The Constitution is the voice of the people. Any statute passed in contravention of its provisions is utterly void. It is not an unconstitutional law; it is simply no law.

The powers of the Legislative Department are derived solely from the Constitution, and must be exercised in subordination to it. I have never been able thoroughly to understand how the views of Mr. Jefferson, that the courts had no power to declare an act unconstitutional, could be carried into practical effect. It is equivalent to saying that the Court could enforce a statute, but could not enforce the fundamental law, the Constitution.

No man can hold public office in North Carolina, from Constable to the Chief Justice, without taking an oath to support the Constitution of the United States and of the State. In the language of Andrew Jackson: "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."

Were a Judge to fail to do this, he would violate his oath of office and stand condemned of all men as justly deserving public obloquy.

Under the oath to support the laws of the State, a Judge is sworn to maintain the law, to the best of his ability, the law, not only as found in the statute books, but also according to the current decisions. I do not mean that no case can be overruled or that no old error can be corrected, but I do mean a Judge is obliged to follow the law of the State as found in the decisions, as well as in the statutes. The rule is that a long and uniform interpretation makes a fixed interpretation.

In the language of Mr. Evarts, "A long and uniform interpretation, say for seventy years, of a doubtful question under the Constitution, would remove the doubt. What rule shall we apply? One of stability—*stare decisis*. That is the rule. Without it your government has no stability whatever. *Stare decisis*, if we are to have any stability in reference to the Constitution. "Stand by the decisions" is the rule that has preserved the English Government that has no written Constitution. In this rule it has found a firm anchorage, through century after century, and through revolution after revolution.

"A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the Judges are bound to follow that decision so long as it stands un-

reversed, unless it can be shown that the law was misunderstood or misapplied in that particular case. If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their action and contracts by it. It would, therefore, be extremely inconvenient to the public if precedents were not duly regarded, and pretty implicitly followed. It is by the notoriety and stability of such rules that professional men can give safe advice to those who consult them; and people in general can venture with confidence to buy and to trust and to deal with each other. If judicial decisions were to be lightly disregarded, we should disturb and unsettle the great landmarks of property. When a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except for very cogent reasons, and upon a clear manifestation of error; and if the practice were otherwise it would be leaving us in a state of perplexing uncertainty as to the law. The language of Sir William Jones is exceedingly forcible upon this point: "No man," says he, "who is not a lawyer would ever know how to act; and no man who is a lawyer would, in many instances, know what to advise, unless courts were bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate."

I have been so convinced that the Judges are right, so certain that what they did in *White v. Auditor* was in accordance with the general procedure and the decisions, that I have been almost willing to meet counsel for the Managers upon that ground and break a lance with them for the actual approval of the Senate of the opinion of the Court. But while the matter seemed so clear to me, it may not seem so to you, I desire, therefore, again to call your attention to the fact that the Senate does not sit as a reviewing body. That is true in England when the House of Lords reviews the action of the lower courts, but this Court (the Senate) has no reviewing power to pass upon the decisions of the Supreme Court. Its decisions stand as law, and whatever the result of your action here may be, the decisions will still be the law. I protest in the name of justice and fairness that these respondents are not here to answer for any decisions they have made, because the Supreme Court is the body upon which the Constitution has devolved the duty of passing upon the law. We are met with the statement, made apparently in good faith, that the Justices are guilty if their decision is not in accordance with the law as the Senate shall find it to be; that ignorance of the law excuses no man, especially not a Judge; for it was said if it did not excuse an ignorant man, much less could it excuse a Supreme Court Judge.

But, Senators, the more I consider the line of argument pursued by the prosecution in this case, the more vehemently does my soul rise in protest. I feel that the counsel for the respondents have, perhaps, been in error in permitting themselves to discuss questions of law and practice, as if the Senate were sitting as an appellate Court, reviewing a decision of the Supreme Court.

The counsel have reviewed every step taken by the Supreme Court, both of practice and law, and apparently have hugged the fond delusion to their breasts that if they could show that the respondents had made a single mistake in the practice, it would be the duty of the Senate to find them guilty.

We believe that they have followed precedents and that their decision was according to law, and have offered many of the best lawyers in the State as witnesses to prove it. But if they were wrong it would not in the slightest degree affect the result. Are Judges to be impeached every time the House or Senate think they commit an error? What would be the tribunal to decide this vexed question?

It is only fair to the respondents, then, that we should place their defence upon the high ground that a judicial officer can not be held to answer in any tribunal unless there is a corrupt intent. The proposition is as old as the inception of the law; it was hoary with age when the Pandects of Justinian were given to the world. It must be so from the very nature of things. What man would dare to sit in judgment upon the lives and property of his fellow-men, if he were liable to be called to account for any error he might commit? Not even the Managers will claim that this perfect infallibility is required of the Judges of the Superior Courts. The supreme tribunal is created to correct their errors, and is kept very busy doing it. But is that tribunal infallible? Is an error of judgment upon a constitutional question to be sufficient ground for impeachment? If this is true, then in every dissent upon a matter involving the constitutionality of a statute, either the majority of the Court or the dissenting Judge must have violated the Constitution. The one in upholding the statute which violates the fundamental law, the Constitution, or the other in declaring the act void, and thus attempting to overrule the will of the people as expressed in a statute. And yet, since the abortive attempt in Ohio, one hundred years ago, to impeach a Judge for an opinion that a certain statute was unconstitutional, there has been no case of impeachment brought against an American Judge on account of any decision. Several have been impeached for arbitrary and oppressive conduct, one in Pennsylvania for refusal to permit an associate to charge the jury; a United States District Judge in New Hampshire, for refusing an appeal, and for drunkenness and misconduct. Judge Pickering, the poor victim, was probably insane, but

under the law there was no way to remove him save by impeachment. Judges Chase and Peck were both impeached for arbitrary and oppressive conduct, and both acquitted. Never before in the history of American jurisprudence have Judges been brought to the bar of any Senate because certain members of the House of Representatives did not agree with them as to the correctness of a decision. Point by point have the Managers and their counsel gone over the case of *White v. Auditor* to magnify trifling errors. These have been already answered, and I have been singularly unfortunate if I have not pointed out the errors underlying their criticism. But if they are right in that particular, and the Judges were wrong, it is hardly worthy of refutation to treat these errors as subjects of impeachment.

You are not kept here from your homes to try any such issue. You are here to try whether these Judges have acted with wilful disregard to the Constitution; if they have, not from mistaken judgment, but with a set and malicious purpose to encroach upon the Legislative Department, wilfully set at naught a constitutional statute. It is true there is no evidence of this. It is true there is absolutely nothing before the Court which would justify this verdict, and it is because of this want of evidence that the Managers and their counsel have been forced to assume the positions which they have gravely argued to you.

I defy the counsel for the prosecution to cite a single instance in English or American jurisprudence, in which a Judge has ever been held responsible, civilly or criminally, for any error made, unless there was a corrupt intent. If a man acts judicially the maxim does not apply that every man is presumed to know the law. It is true no man can say, when he violates the statute or the common law, that he did not know there was any such law. No man can come from another State, and, when arrested for carrying a pistol, say, "I did not know you had a law against carrying concealed weapons." Let me give you an exact analogy. Suppose a law is passed making it unlawful to sell liquor within two miles of Antioch Church, and that it takes effect from and after its ratification; when an indictment for its violation comes before the Court the defendant can not be heard to say, "I did not know of the law." But if another man is indicted under this act, and before the case comes on for trial, the act is repealed by the General Assembly, and if the Judge does not know of its repeal, and sentences the man to jail, is the Judge liable to an action for false imprisonment? No lawyer who is careful of his reputation will say he would be.

Mr. Manager Allen has quoted from Manager Butler in the Johnson impeachment trial to demonstrate the proposition that the respondents were guilty, even if they acted without corruption and in

good faith. He can find nowhere in all the books any authority to support that position in regard to a judicial officer. Even Butler, the insulter of the women of New Orleans, was too great a lawyer to claim that this maxim applied to Judges. The distinction was clearly and unmistakably drawn between an excutive and a judicial officer by his associate, Manager Bingham, Vol. II, 413, Johnson Imp.:

"It is conceded that there is a partial exception to this rule, and that exception furnishes all the law which has appeared in this case, so far as I have been able to discover, in the defence of the executive. It is an exception, however, made exclusively in the interest of judicial officers. The rule is well stated in 5 Johnson, 291, by Chancellor Kent, in the case of *Yates v. Lansing*. I read from that authority:

" 'Judicial exercise of power is imposed upon the courts, and they must decide and act according to their judgment, and, therefore, the law will protect them.' "

He adds: "The doctrine which holds a Judge exempt from a civil suit or indictment for any act done or omitted to be done by him as Judge has a deep root in the common law. It is to be found in the earliest judicial records, and it has been steadily maintained by an undisturbed current of decisions in the English courts amid every change of policy, and through every revolution of their government."

A Judge, manifestly acting within his general authority, can not be held to answer for an error of judgment. He would only be impeachable, however erroneous his judgment might be, for an abuse, for a usurpation of authority great in itself, and it must be especially averred, and must be proved as averred. No such rule ever was held to apply since the courts first sat at Westminster, to an executive officer. It is an exception running through all the law in favor of judicial officers."

And later Manager Bingham said:

"It is the rule of universal application to executive officers and to all officers, save judicial officers, that ignorance of the law can never be interposed as an excuse, either in civil or criminal proceedings."

This doctrine is found in the very horn-books of the law. Bishop Crim. Law, sec. 913.

"When a man serves in a judicial or other capacity in which he is called to exercise a judgment of his own, he is not punishable for a mere error therein or for a mistake of law. Here the act to be cognizable criminally, or even civilly, must be wilful and corrupt."

Upon these grounds, Senators, the counsel for the respondents with confidence maintain the law to be that unless the respondents have acted corruptly, wilfully, with evil intent, the prosecution must fail upon its threshold. I shall not elaborate the point; it seems to me to be too clear. The respondents are here to-day seeking even-

handed justice; they have not asked for mercy. They do not come before the Court acknowledging any error. They have said that they acted according to the lights before them, and have seen nothing to change their views as to the justice and wisdom of their action. But if you do not concur with them, they say that they have at least acted as men under the sanction of an oath, and in good faith. They ask with perfect confidence that they may receive from this high Court that justice of which Sidney Smith declares:

"Truth is its hand-maid, liberty its child, peace is its companion, safety walks in its steps, victory follows in its train. It is the brightest emanation of the gospel, it is an attribute of God."

Two of the distinguished counsel for the Managers have compared this high tribunal and the contest now waging before it to the "Bloody Angle" at Gettysburg. In the name of humanity and law, in vindication of the accuracy of history, I protest against the comparison. The "Bloody Angle" is a sacred spot, consecrated by the life-blood of heroes. There gallant soldiers met in deadly conflict, each moved by the highest impulses of patriotism, and periled their lives for the preservation of their country. But if blood is to be poured out upon this floor, it will be the blood of those sacrificed to injustice, the victims of an unrighteous and dangerous party policy. God forbid that this hall, with all its historic memories, shall ever become the scene of such a "Bloody Angle."

When men holding high office have conscientiously attempted to perform their duty according to their oaths; when they have declared the law as they believe it to be, according to the precedents, whether they were wise or unwise, wrong or right, to sentence them to an unmerited punishment, would indeed be "the bloodiest picture in the book of time."

Take care, Senators, that you do not make theirs the blood of martyrdom!

SPEECH OF B. F. LONG, OF COUNSEL FOR RESPONDENTS.

MR. PRESIDENT AND SENATORS:—The authority for the organization of this high Court has its origin in our Constitution, which provides "that the judicial power of the State shall be vested in the Court for the trial of impeachments, a Supreme Court, Superior Courts, courts of Justices of the Peace, and such other courts inferior to the Supreme Court," as may be from time to time established by law, and which also provides that a majority of the members of this Senate, when duly organized for the purpose, is clothed with the power and duty to try impeachments, and which confers upon two-thirds of a majority of your body present the power to render a verdict of guilty, and to enter a judgment of removal from, and disqualification to hold office in this State. Your powers are further defined by the Legislature in chapter 25, volume 2, of The Code. In giving authority for your existence the Constitution speaks of you as a "Court." The Legislature when it enacts laws defining your powers and duties under the Constitution in the first section of chapter 25, speaks of you as "the court for the trial of impeachments." So you do not sit here to try this case as a political assembly. You are not the accusing or impeaching body; you are a court—a criminal court—to try a criminal cause and to your bar as such court these respondents have been summoned to answer criminal charges made against them, and they do now answer every charge, as we contend, to your entire satisfaction.

In all important criminal trials in this country, save impeachments, there is a division of responsibility. The presiding Judge is required to instruct the jury what the law is governing the case. To the jury is entrusted the responsibility to find the facts.

But in the discharge of your solemn duties there is committed to you all the power and all the responsibility of both the Judge and the jury. In ordinary trials, if the jury errs, the Court can set the verdict aside; if the Judge errs, the defendant can appeal to the Supreme Court. But in this case, if you err as to the facts, there is no power to set your verdict aside; and if you err as to the law, there is no appellate tribunal that can review or reverse your finding. In ordinary trials the defendant is allowed the privilege to challenge the jury on several grounds, and especially if there is a juror who

has formed and expressed an opinion as to the guilt of the accused, or if the juror is akin to the prosecutor; in such instances, and many others, upon objection, the juror will not be permitted to sit on the trial of the case because of his bias. But in this Court, Senators, no such safeguards to impartial justice are thrown around the respondents by the laws of the land. Neither for favor, nor for any cause, however just, can any one of you, as juror or judge, be stood aside. The respondents can only trust to your consciences and to your oath; that oath which you have taken and in which you have said that you will "truly and impartially try and determine the charge in question under the Constitution and laws according to the evidence." As these respondents could not ask any one of you before you were sworn, or at any time, whether you had ever formed and expressed an opinion unfavorable to them, or whether there was any other cause in morals or good conscience which disqualified you from rendering an unbiased verdict, I do now for them, and in their behalf, say to you that the country expects you to do your duty with independence and impartiality. When you reflect upon the nature, the extent, and consequences of your extraordinary powers, that your verdict and judgment when rendered are irreviewable, irreversible and irrevocable, that your judgment may rob these distinguished citizens of that honor and esteem of their fellow-men, dearer to them than their lives, I know you will be seriously concerned respecting the grave duties which are now confided to you without your solicitation. The respondents are compelled to confide their honor and their good names to your keeping, and they expect at your hands an unbiased, a just and a righteous judgment from the law and facts as they are unfolded here. And permit me to say that every just and patriotic citizen in the State will look to you for such a judgment; and when your fearless, disinterested and conscientious judgment has been recorded, you can reflect upon it in the years to come with complacency and satisfaction.

It has been our good fortune never before to have been called upon in North Carolina to witness the trial of two of the highest judicial officers of the State, charged with crimes and misdemeanors in office. Indeed, no Judge ever before has been held to answer such a charge before this high Court. Once, and once only, in our history, the Senate of this State sat as a high Court of Impeachment to try the Chief Executive, charged with subverting the civil authorities in Alamance and Caswell counties, and establishing instead the authority of organized force; with arresting without warrant, with armed soldiery, numerous law-abiding citizens of those counties, and denying them bail or trial; with flagrantly and forcibly refusing to obey the writ of *habeas corpus* issued by the highest judicial tribunal in the State, and with other high crimes and misdemeanors in office.

When the Governor had thus declared war and actually set it on foot in two counties, the people of the State, with practical unanimity, were aroused to the highest pitch of indignation, and demanded that he should be impeached and deposed from office for executive usurpations, and at the next General Assembly following these acts, he was impeached, convicted and deposed, and amongst those who favored and voted for his conviction were several Senators of his own political party.

Is there a sense of insecurity in North Carolina at this time as there was in 1871, demanding impeachment? When you left home, Senators, to come to this capitol, did you expect to be transformed from a legislative body into a criminal court? Was there a demand amongst your constituents for the impeachment of these Judges? Had not all these acts complained of happened and been published and known to the reading public before the last general election, or before you left your homes? What sudden and undiscovered facts have been revealed in connection with the conduct of these respondents and their opinion in the case of *White v. Auditor*, or in any other case, that make it necessary to convene this high Court and put them upon trial for high crimes? Is the safety of the Commonwealth threatened? Has the State suffered wrongs at their hands? Do the bench and bar, and the enlightened and thoughtful people of all classes demand the impeachment of these respondents for some great public wrong done by them? I leave these questions to be candidly answered by each Senator for himself. I deprecate any appeals that have been made to create sentiment during the progress of this trial, whether inside or outside of these walls. These respondents would readily agree for this Court to render a verdict that would represent the sentiment of your constituents. But I shall make no demand here that this cause shall be settled agreeably to public sentiment, but insist that it be tried and determined according to the settled principles and rules of law established in the courts of this country. I shall insist upon this, although we all know that in 1870-'71 there was a universal demand for the deposition of Holden, whereas, we all know now that there was no serious thought generally of the impeachment of these respondents until the introduction of the resolution in the House. I have been induced to make this allusion to public sentiment solely in response to what has been said by the other side.

I venture to say to you, Senators, that unless a grievous public wrong has been done by these respondents, and unless you are satisfied, beyond a reasonable doubt, that this public wrong has been wilfully and knowingly done, it would be far better to leave the matters urged for their removal from office to be settled before the people at the polls, where, under our system, the conduct of all officials passes

in review, and where official fitness and delinquency may be passed upon and judgment rendered by the people themselves.

What is an impeachable offence? It will be difficult, if not impossible, to reach a just verdict, unless you determine with approximate accuracy, what are the true ingredients of an impeachable offense. Judge Allen, who opened this case on behalf of the Managers, has given you his impressions upon this subject, and adopts as his definition of an impeachable offense these words: "An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government, or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, or law, of an official oath, or of duty, by an act committed or omitted, or without violating the positive law by abuse of discretionary powers from improper motives or improper purpose." From this definition, the learned Manager undertakes to convince you, that improper motives are not to be considered, except where the Judge abuses the discretionary power; that the respondents should be convicted, although you were to find that their acts were the result of a mistake of judgment; that it is not necessary to show that they knew they were doing an illegal act; that if the acts were the result of error in judgment, or even from honest motives, they would be guilty just as if the acts were done from a corrupt motive, provided the purpose of the impeachment is for the public good; that in such case you would be justified in convicting and condemning the respondents and consigning them to infamy by removal from office.

If this definition of an impeachable offense, and the deductions made therefrom, were to be established as the principle upon which judicial officers are to be arraigned, tried and convicted, there is not a Judge upon the bench in North Carolina who could not be impeached, convicted and deposed. The doctrines advanced are such as to challenge inquiry and to arouse apprehensions for the future. They move one with emotions of alarm and surprise. Upon investigation I find that this definition of an impeachable offense was promulgated by one of the Managers in the impeachment trial of Andrew Johnson; it seems to have been born in the brain of an artful man, and put into smooth phrase for the express purpose of fitting the case then on trial, and to avoid actual, positive, and definite averments as to the criminal offense. The President was impeached as an executive officer; the main charges made against him were that he had violated the provisions of an act regulating the tenure of certain civil offices, by the removal of the Secretary of War. The President therefore was tried as an executive officer for the alleged violation of the terms of a positive statute. He was not tried as a Judge of a court for errors of judgment, discretionary, or otherwise, or as a

judicial officer, who is authorized and required by law, under oath, to interpret the Constitution and laws. The definition as applicable to the executive officer, however, was not sustained in the trial of the President, by the best thought of the Senate of the United States; it was not concurred in by all the Managers; it was utterly repudiated by such great lawyers as Benjamin R. Curtis, Wm. M. Evarts and others, and has never been accepted as a rule of law upon which to conduct the trial of a case of impeachment in this country, as interpreted by the honorable Manager, who relies upon it so tenaciously. The definition, the principle it promulgates, is scarcely less odious and dangerous than the man in whose mind it originated. The author of this new doctrine is the man who, it is said on one occasion, had been accused of many of the crimes enumerated in the decalogue, but whose only plea in justification and explanation was, that he had never been accused of being a fool. The author is the second hero of New Orleans—General Benjamin F. Butler, of Massachusetts. In the trial of that celebrated case, as reported on page 644 of the trial, one of the counsel for the President, replying to Mr. Butler, said: "Admitting that it (the Senate) was a constitutional tribunal, they (Butler and other Managers) have yet claimed that it knew no law, either statute or common; that it consulted no precedents, save those of parliamentary bodies; that it was a law unto itself; in a word, that its jurisdiction was without bounds; that it may impeach for any cause; that the Constitution would appear to limit somewhat its jurisdiction, but everything this tribunal may deem impeachable becomes such at once, and when the words high crimes and misdemeanors are used in the articles of impeachment, they are without signification, and are intended merely to give solemnity to the charge.

To sustain this extraordinary view of the character of this tribunal, we have referred to English precedents, when, impeachment and attainder, and bills of pains and penalties, labored together in the work of murder and confiscation.

But Mr. Wilson, one of the leading Managers associated with Mr. Butler in the Johnston case, had a different opinion from Mr. Butler, as to what was an impeachable offense, as will appear from the following language quoted by him from Hopkinson on the trial of Chase: "The power of impeachment is with the House of Representatives, but only for impeachable offenses. They are to proceed against the offense, but not to create the offense, and make any act criminal or impeachable at their will and pleasure. What is an offense, is a question to be decided by the Constitution and the law, not by the opinion of a single branch of the Legislature, and when the offense thus described by the Constitution and the law has been committed, then, and not till then, has the House of Representatives

the power to impeach the offender. A civil officer may be impeached for a high crime. What is a crime? It is such a violation of some known law as will render the offender liable to be prosecuted and punished. Though all wilful violations of rights come under the generic name of wrongs, only certain of these made penal are called crimes. All that has been said, therefore, concerning the term crimes may be applied with equal force to the term misdemeanors, as used in the Constitution. The latter term in nowise extends the jurisdiction of the House of Representatives beyond the range of indictable offenses. Indeed the term crime and misdemeanor are in their general sense synonymous, both being such violations of law as expose the persons committing them to some prescribed punishment, and although it can not be claimed that all crimes are misdemeanors, it may be properly said that all misdemeanors are crimes."

Edmund Burke did not think an officer ought to be impeached for a mistake, and he lived in a land where there was a severer criminal code than we have ever had. In his works, Vol. 7, pages 13 and 14, will be found his speech as one of the Managers in the impeachment of Hastings, in which he says: "The crimes with which we charge the prisoner are substantial crimes; they are no errors or mistakes, such as wise and good men might fall into, which may produce very pernicious effects, without being in fact, great offences. The Commons are too liberal not to allow for the difficulties of a great and arduous public situation. * * * We know as we are to be served by men, that the persons who serve us, must be tried as men and with a very large allowance, indeed, to human infirmity and human error."

But my friend, Judge Allen, would let no erroneous, mistaken Judge escape! It is fortunate for him and for me that we were defeated in 1894. I am now reconciled. Senators, it will not do to try these respondents, or anyone else, by the rules given us by the prosecution; it will not do to convert this serious trial into an inquest of office, and seek for, and find only a plausible excuse to remove officials from office.

By what rules shall they be tried? We must look for other guides than the honorable gentlemen who represent the prosecution if we are to pursue the path of justice. I find my friend's rules and conclusions repudiated by the author from whom he quoted so often. Foster on the Constitution, Vol. 1, page 587, says: "Some advocates have gone so far as to maintain, by a misapplication of a term of the common law, that the proceedings on an impeachment are not a trial, but a so-called inquest of office, and that the House and Senate may thus remove an officer for any reason that they approve." And he says on page 588: "But the judgment of the Senate of the United States, in the cases of Chase and Peck, as well as those of the State

Senates in the different cases which have been before them, have established the rule that no officer should be impeached for any act that does not have at least the characteristics of a crime. And public opinion must be irremediably debauched by party spirit before it will sanction any other course."

But the honorable Manager cites Barnard's case as a precedent to maintain these charges against the Chief Justice for acts done whilst Associate Justice, but he fails to tell us what is defined to be an impeachable offense in that case. He invokes the principle to destroy, but fails to reveal that which saves. In that case the counsel for both sides substantially agreed as to what was an impeachable offense, and I quote from it what was said by Judge Grover, with whom the rest of the Court agreed (Barnard's Impeachment Trial, pages 2137-8): "The counsel of the respective parties agree substantially upon the law as to what constitutes an impeachable offense. * * * That an impeachable offense in a judicial officer consists in an intentional violation of duty on his part to the prejudice of public justice, or a reckless exercise of his functions, indifferent as to whether what he did was right or wrong. * * * It is the duty of every judicial officer to investigate questions that are presented for his determination, and exercise his judgment, and when he has, in good faith exercised his judgment, he is excusable for error; but if he does the act without regard to whether it is right or wrong, or if he does it, conscious that he is violating the law, or if he act without having examined it at all, he is guilty of a violation of the duty of his office. This is *mal* and corrupt conduct in office and an impeachable offense."

Why the patience of this Court should be taxed with so much refinement about what is an impeachable offense, is a mystery, unless it be to put out of sight the gravity of the charges and the necessity for ample proofs to sustain them.

On the 10th of April, 1869, the Legislature provided for the impeachment of officers in six specified instances, and one of these was for "corruption or other misconduct in his official capacity." (Code, Vol. 1, sec. 2937.) The meaning of this seems plain—that an officer is impeachable for corruption in office, or for any other misconduct in office of a kindred nature to corruption. *Noscitur a sociis.* In speaking of these words, Chief Justice Smith, in his great argument in the Holden trial, says:

"The punishment prescribed is expulsion from office; it may be also permanent incapacity to hold office in the State. This necessarily presupposes some official act—something done or omitted, connected with the discharge of official duty by which the incumbent has shown himself to be unfit longer to be entrusted with the office and his removal becomes a public necessity, and this view is fortified

by the fact, that the party, while punished by impeachment with the deprivation of office, is still amenable to the criminal law, as if no such trial had taken place. It must, therefore, not be a mere crime capable of redress before the Criminal Courts of the State. It may have the elements of crime, but the act must be one of official depravity, official corruption, official dishonesty, the exercise through improper motives of powers not conferred, or the abuse and misuse of powers that are conferred." Impeachment Trial of Holden, Vol. III, page 2371.

The interpretation placed upon this statute—and this statute being the only one we have defining the offenses for which officers may be impeached—is of great importance, especially as it comes from the clear mind of that great lawyer, W. N. H. Smith, who afterwards adorned the office of Chief Justice of our highest Court. It is also noteworthy that Judge E. J. Warren, one of the ablest lawyers of his day, and a distinguished Senator and member of the Court of Impeachment of Holden, was of the opinion that if Holden undertook as Governor to exercise only a discretionary power under an unconstitutional act of the Legislature, but, nevertheless, acted in good faith and without dishonest or corrupt motives, that he was not guilty of an impeachable offense. The pivotal question, as he thought, was whether Holden acted in good faith in the exercise of his discretion under the act. If he acted in good faith he was not guilty; if he acted in bad faith he was guilty. Holden Trial, Vol. III, page 106.

In seeking a way to justice I prefer to follow Curtis, Ewart, Wilson, Hopkinson, Burke, Grover, Smith, Warren, Erskine and Wirt than in the footsteps of General Butler.

Senators, our able President has made a ruling, from which there was no appeal taken, with regard to the admission of expert evidence. He holds that "on trials for impeachments the rules of evidence are the same as provided in criminal trials before the ordinary courts of law." If the proof of facts necessary to convict or acquit these respondents is to be determined by the same rules of evidence applicable to ordinary Criminal Courts, then, by parity of reasoning, the other rules, time-honored and universally recognized, governing criminal trials, must prevail through all the stages of this trial. Upon this principle they have the right to claim and demand the legal presumption of their innocence as to the charges in each and every one of the articles until the Managers have established the charges by legal proof beyond a reasonable doubt; and to have the presumption also in their favor that their opinions as Judges were rendered in all the cases before them in good faith and with honest motives until the contrary is established beyond a reasonable doubt; and that if you can adopt any reasonable hypothesis in explanation

of these things charged against them, consistent with their innocence, that it is your duty to adopt such hypothesis. The respondents insist that they can and will demonstrate that every decision they rendered and every act with which they are charged were in conformity to the law and precedent. But if you should decide otherwise, they will insist that where a man acts in good faith, or in the honest execution of an official duty, and makes a mistake, that there can be no conviction for a criminal offense. I do not contest in their behalf the principle that ignorance of fact is no defense to a criminal charge where there is such statute that makes the offense indictable irrespective of guilty knowledge as in the two instances relied on by the prosecution, except in such case where ignorance of fact is admissible to negative a particular intent. Neither do I contest the proposition that ignorance of the law is no excuse for commission of crime, nor to justify an unlawful act. But I contend that such instances have no application whatever to this case. What is contended for here? It is here contended by the prosecution that the respondents have failed to declare the law as it should have been declared, and that in doing so they have violated the Constitution and the statutory laws of the land. It is judgments on questions of law, therefore, that you are dealing with. You are called upon to sit in judgment upon judgments; to review as a Court above the Supreme Court the opinions of that Court on questions of law—opinions deliberately rendered by the highest judicial appellate tribunal of the State. The House of Lords hears impeachments in Parliament, but the House of Lords, largely composed of lawyers, is also invested with legislative and judicial functions. By analogy our Federal and State Senates have been invested with the power to hear impeachments, but in all of my researches I have never been able to find a case in the mother country, or in this country, that involved the same questions which we now have at issue. I can find no instances where any Judge of an appellate Court has been put on trial, charged with a high crime for opinions which he has rendered in his official capacity. Two-thirds of your body, or more, are gentlemen who have never followed the profession of the law. To determine the guilt or innocence of these respondents in rendering opinions as Supreme Court Judges requires a thorough understanding of the opinions themselves and of the precedents upon which they are founded. The field of investigation is so extensive and involves so many questions of intricacy, that the task imposed upon the Senate, sitting as a Court, is of such magnitude as to exact the highest judicial intelligence to unravel and thoroughly understand these troublesome questions.

If you find that the opinions of the respondents referred to in the articles correctly declare the law, or are sustained by the weight of authority, as we expect to show you, then the charges fall to the

ground. If on the contrary you find as a court of review that they have erred, or made mistakes in delivering their opinion, then the serious question is presented to you as to what must be shown to you, beyond all reasonable doubt, to justify you in convicting these respondents. It is clear to me that there must be a dishonest purpose, an abuse of power, a corrupt intent, to justify conviction. It is when conduct is indifferent in itself, and becomes criminal only from the intent, that the intention becomes absolutely essential, and it is necessary in such case, to allege, and prove it, as any of the other facts and circumstances of the case.

Now, what are the charges in the several articles, and what are the proofs necessary to sustain them?

The first article charges that the respondents unlawfully and wilfully, and in violation of Art. I, sec. 8, Art. IV and sec. 9, and of Art. XIV, sec. 3, of the Constitution, and of the laws, caused the mandamus writs to issue in the case of *White v. Auditor*, when there was no appropriation for the payment of White's salary and account.

The second article charges respondents with intending to bring the General Assembly into disrepute and wilfully and unlawfully and defiantly and contemptuously violating the provisions of chapter 21, Laws of 1899, and of the Constitution respecting the issue of process in the nature of execution to collect a claim against the State.

The third article charges that on the 14th day of June, 1900, twenty-three days after the decision and judgment, in *White v. Auditor*, the Legislature passed a resolution of inquiry, and made inquiry by two of its members of the Treasurer, whether the claim of White had been paid, and that the Legislature intended thereby to forbid payment to White, and that the respondents, knowingly, wilfully and wrongfully directed the writ to issue in violation of the Constitution and of the acts of the General Assembly.

The fourth charges the respondents with directing the writs to issue unlawfully and contrary to the course and practice of the Courts, (1) because the claim was one against the State, and should have been brought originally to the Supreme Court, and not submitted in the first instance to the Judge of the Superior Court; (2) that the writs were issued in wilful disregard of statutory provisions relating to writs for mandamus; (3) that the writs were issued contrary to the course and procedure of the Supreme Court; (4) because the writs were in disregard of chapter 19, Laws of 1899; (5) because one of the Associate Justices was denied the right to file a protest and dissent respecting the issue of the writ at the Fall Term, 1900, this being about five months after the case had gone off the docket by final judgment.

Article V indefinitely charges that at various times, and in numerous decisions (referring to the office-holding cases), the respondents

wilfully, unlawfully, persistently, intentionally, contemptuously, and by a specious course of reasoning, disregarded, nullified, destroyed and defeated, as suited their purpose, the acts of the General Assembly in violation of the Constitution, and that in culmination and consummation of this persistent, wilful and unlawful intent, caused to be issued the writs of mandamus, and the claim of White for $831.15 to be paid.

I present this concise statement as to each of the articles to show that every one of them charges the respondents with acts which were done by them contrary to the provisions of a positive statute, or the Constitution, or both—the acts referred to being acts of the mind—opinions rendered as Judges.

Each and every one of the articles charges the respondents with unlawfully, intentionally and knowingly committing the acts in violation of law, that is, delivering opinions contrary to law. Therefore, to sustain these charges as set forth in each and every one of the articles, the burden is upon the Managers throughout, to show to your satisfaction and beyond a reasonable doubt:

1. That the acts and things charged to have been done by respondents were done in the manner and with the intent as therein charged.

2. That the matters and things charged against each of these respondents were done contrary to law, that is, that every opinion complained of, must be shown to be contrary to law and precedents.

3. That if you find that the acts charged were done contrary to law, that you go a step further and find the further fact that these acts and things were done intentionally, wilfully, knowingly and with the guilty purpose to violate the law, or to corruptly exercise powers not conferred, or corruptly misuse or abuse powers which were conferred.

I insist that as these charges in every one of the articles involves these propositions, that they must be sustained by proof and beyond a reasonable doubt before you can convict on any one of the articles.

What evidence have the Managers brought here to sustain these accusations? They have put in evidence the one hundred and twenty-six volumes of the Supreme Court Reports, the oaths of the Justices, and certain oral testimony relating to the issue of the mandamus, which occurred five months after the opinion and judgment in *White v. Auditor* were rendered. There is not a syllable of testimony offered in the case tending to disclose any act, or intent, or evil design, of the respondents prior to, or contemporaneous with, the preparation or rendition of any opinion whatever referred to in the articles, save and except what is disclosed in and must be derived from the opinions themselves as published in the reports. This is true as to the opinions which were rendered in *White v. Hill* and in

White v. Auditor, as well as every other opinion rendered for which the respondents are sought to be held responsible. In order to sustain their contentions the Managers are driven to find in the opinions themselves the inherent and incriminating evidence to convince and convict.

The first four articles are founded upon what was done by the respondents and their associates, Chief Justice Faircloth and Justice Montgomery, in the cases of *White v. Hill* and *White v. Auditor*. The Chief Justice, though dead, is impeached in the articles for what he did in connection with respondents in both cases, but Justice Montgomery, who concurred in the opinion in *White v. Hill* is not included in the article. I have heard no reason assigned for the omission.

As my associates have assigned me the task to review all the articles, I will undertake to do so by considering the first four articles together, because the charges contained in these articles are confined to what was said and done by the respondents in the two cases which I have just mentioned. It, therefore, becomes my duty to review the opinions in these cases upon which these four articles are founded, and, in doing so, I hope to be able to demonstrate that the respondents declared the law, as they understood it to be, honestly and in good faith; that the opinions upon their face reveal conscientious investigation, and are sustained by the highest authority; that there was an appropriation for the payment of White's salary; that the claim of White was not a claim against the State within the meaning of the Constitution; that the resolution of the 14th of June did not forbid the Treasurer to pay White's salary; that the mandamus writs issued regularly and lawfully, and that no legal right of their Associate Justice was denied by the non-assent of respondents to the filing of the protest and dissenting opinion in October, 1900.

White v. Hill and White v. Auditor Reviewed.

In this case of *White v. Hill*,Theophilus White brought an action in the nature of *quo warranto*, for the recovery of the office of Chief Inspector, under the Act of 1897, alleging that he was appointed to the office by the Governor February, 1897,for a term of four years,but had been ousted by the defendant and his associates, who claimed to hold the office of Shell-Fish Commissioners, under the Act of 1899,chap. 19. Defendants claimed to be rightfully in possession of their office under the Act of 1899. The case was heard on appeal and decided November 21, 1899, in favor of the plaintiff. Chief Justice Faircloth writes the opinion and says: "It is well settled that an office is property; that the Legislature may abolish an office of its own creation; that it may, when not in conflict with the organic law, increase or diminish the duties of an officer; but it can not, as long as the

office remains, deprive the officer of the material part of his duties and emoluments, and that the oath and salary are the incidents of an office, but no part of its duties."

He also holds that the Act of 1899, chap. 19, is the same in substance as the Act of 1897, chap. 13; that the name, methods and details are different, but the same general object is found in both acts. Later, when payment of White's salary was refused, he brought his action against the Auditor and Treasurer for its recovery, and the case was heard by Judge Starbuck, and then heard upon appeal by the Supreme Court at Fall Term, 1899, and decided May 22, 1900, affirming the judgment below, which ordered and adjudged that a mandamus issue against the Auditor to audit, and the Treasurer to pay, plaintiff's salary.

Upon the hearing before the Supreme Court upon the facts agreed, it appeared to the Supreme Court, amongst other things, that the Treasurer had on hand of the oyster fund, collected under the Act of 1897, chap. 19 of the Laws of 1899, an amount sufficient and available for the payment of plaintiff's salary and expenses, the amount of his salary and expenses was fixed by the statute, the amount of his salary unpaid being $900, if allowed under the Act of 1897, and $400 if allowed under the Act of 1899, chap. 19.

Justice Furches, delivering the opinion of the Court, says, in substance:

"It has been decided that the plaintiff is entitled to hold his office as Chief Inspector, to which he was appointed in 1897, for the remainder of his term of four years. This is settled, and the question is now presented as to whether or not he shall have pay for his services. The plaintiff holds his office under an appointment made in 1897, but he holds and discharges the duties of his office under such laws as may be passed, and are in force during his term of office." On the 28th of February, 1899, the Legislature passed an act amendatory of chapter 13, Laws of 1897, the act under which plaintiff was appointed, and two days thereafter it passed chapter 19, Laws of 1899, relating to the same subject-matter; this chapter 19 does not state that it is an amendment or repeal of the former acts relating to the same subject-matter, except so far as its provisions are in conflict with chapter 18, Laws of 1899. Six days later chapter 21, Laws of 1899, was passed, supplemental to chapter 19. This last act prohibits the Treasurer from paying any compensation claimed for services, unless the claimant shall be authorized to render the services under chapter 19.

The Court held that as the Legislature had general powers to legislate and, as these acts referred to the same subject-matter, that they should all be observed, upheld and enforced, unless they were

in conflict with vested constitutional rights; that as the Court had decided in *White v. Hill* that the plaintiff was entitled to hold his office till his term expired and to perform its duties, that it was his duty to perform all the duties of his office agreeably to the provisions of the Laws of 1897, as modified and changed by the Acts of 1899, and also to comply with and perform the duties required of his office under chapter 19 of the Laws of 1899; that the Laws of 1897 and 1899 were all to be observed when not in conflict with vested rights; that chapter 18, Laws 1899, was expressly stated to be an amendment of the Act of 1897, and, although chapter 19 did not state whether it was intended as an amendment or not, nevertheless, as all these acts related to the same subject-matter, they must be considered together and treated as amendments; and, that where the latter act repealed the former act, or is in conflict with it, the provisions of the latter act must prevail unless in conflict with vested rights; that thus construing the Act of 1897, and chapters 18 and 19 of the Laws of 1899 together, the Court was of the opinion that White was not only authorized, but that it was his duty to perform the duties required by chapter 18; that it was not necessary for the Court to decide whether chapter 21 was valid or not, because there was no reason to apply the provisions of this chapter in regard to the payment of White's salary and expenses. Especial attention is called to the fact that if the Court properly construed these statutes and White was authorized to perform the duties required by chapter 19, then there was nothing in chapter 21 which prohibited the Treasurer from paying him for his services, but on the contrary, by implication, if not by express provision, the Treasurer was authorized to pay the officer for services rendered under chapter 19.

The Court further holds that the changing of the name of an act entitled "An act to promote the oyster industry of North Carolina" to that of "Shell-Fish Commissioners," did not abolish the plaintiff's office, and that the change in the name of plaintiff's office from that of of "Chief Inspector" to that of "Chairman of the Shell-Fish Commission," did not oust the plaintiff from his office, or deprive him of his salary; as the Legislature of 1899 reduced the salary of White from $900 to $400 per annum, and 5 cents per mile travelled when engaged in his work, and extra expenses not to exceed $50.00 per annum, the Court respected this reduction, because, as Judge Furches states in the opinion: "We can not say that this reduction was not made for the public benefit, and we have no power to change it, and no disposition to do so if we had."

The Court, therefore, held that as White was entitled to hold out his unexpired term of office—that as the funds were in the hands of the Treasurer, under both the Acts of 1897 and 1899, specially appropriated for the payment of his salary, and as the definite amount of

his compensation was fixed by the statute and by the facts agreed in the case—that the plaintiff was entitled to his pay, and to a writ directing the Auditor, as a ministerial officer, to audit the claim and a writ against the Treasurer to pay it.

The Court further held that the accounts of White for his salary and expenses would be sufficiently made out when issued by the Clerk of the Board, and countersigned by the plaintiff, White, the acting chairman, in place of Hill, and that the warrant of the State Auditor would issue upon this certificate. *White v. Auditor*, 126 N. C., 578.

Upon this hearing a majority of the Court affirmed the judgment below as to the mandamus and rendered judgment in favor of the plaintiff, directing a mandamus to issue to the Auditor and the Treasurer. The prosecution insists that the respondents and the dead Chief Justice, in affirming the judgment authorizing the said writs, are guilty of unlawfully and wilfully violating Art. I, sec. 8, of the Constitution, which says: "The legislative, executive and supreme judicial powers of the government are to be forever separate and distinct from each other." And Art. IV, sec. 9, which says: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon. They shall be reported to the next session of the General Assembly." And also Art. XIV, sec. 3: "No money shall be drawn from the treasury but in consequence of appropriations made by law."

It becomes material, therefore, to inquire wherein the facts justify the allegation of any violation of Art. I, sec. 8. Did the Court, in rendering its opinion, usurp any legislative or executive function? Under the laws it was its duty to decide the case, which was properly constituted before it. It heard argument, delivered an opinion as it thought in conformity to precedents, and rendered judgment agreeably to the rules of the Court. All the acts of the Justices were exclusively judicial, and these acts they were bound to perform under their oaths. Did the Governor have jurisdiction to hear the case? Ought it to have been brought before the Legislature for it to construe its own enactments?

But it is contended that the Supreme Court had only original jurisdiction to hear the claims of White for his salary and expenses and make a recommendation therefor to the Legislature.

What is a salary? A salary is an annual or periodical compensation for services rendered, or a fixed sum to be paid by the year (or as may be otherwise provided, by the mouth, as in this case) for services. How are the salaries of the officers who are in the service of the State paid? By reference to the Revenue Act, chapter 2, Laws

of 1899, section 1, we find that the taxes provided in the act are "applied to the payment of the expenses of the State Government, the appropriations to charitable and penal institutions, other specific appropriations made by law, and the interest on the four per cent consolidated debt of the State;" and a similar provision is found in chapter 168, sec. 1, of the Laws of 1897. So that as White was an officer of the State, appointed by the Governor, and was entitled to a salary and expenses fixed and definite, he was entitled to be paid under the provisions of the Revenue Act, whether there had been a specific appropriation or not.

Besides this general provision, under the Acts of 1897, chap. 13, under which he was appointed, there was a specific provision as to the fund out of which his salary and expenses should be paid, section 13 thereof providing: "That the Chief Inspector shall receive a salary of $75.00 per month and actual travelling expenses, payable on the last day of each month by the said Treasurer * * * and all payments shall be made from the oyster fund." If it is contended that this section was repealed by chapter 18, Laws of 1899, which is true, as I understand it, then, as his office continued under the decision of the Court until the end of his term, and he was required to perform the duties of chairman of the Shell-Fish Commission under the Laws of 1899 and receive the pay as provided by that act reducing the same, it will be seen, by reference to section 9 thereof, that it is expressly provided that the oyster fund shall be kept by the State Treasurer separate and apart from the other public funds, and that the Treasurer shall pay the expenses of carrying out the act from the said fund upon the warrant of the Auditor, Laws 1899, chap. 19, sec. 9.

I insist that this is not a claim against the State. It is a claim against a definite fund specially set apart by law for its payment, in the hands of the Treasurer to be paid upon certain formal authentications. The amount is definite and fixed, and the fund, as it appeared to the Court, was in hand.

What is a claim against the State? In its nature it must be a claim unascertained—contested—unprovided for by any acknowledgment on the part of the State. It is a claim for which the State has made no appropriation, the legality and validity of which are in question. Judge Reade refers to such claims in *Bledsoe v. State*, 64 N. C., 394, and says: "This provision of the Constitution was induced probably by the consideration that many claims would be presented growing out of the events of the late civil war." Chief Justice Pearson, in *Reynolds v. State*, 64 N. C., 460, which was a claim against the State for cotton seized by the United States Government, transferred to the State and claimed by the owner, says: "Such

claims do not extend to disputed questions of fact as may arise in claims against the State, but only to the decision of such important questions of law as may arise in claims the facts in which are agreed on."

When you consider the words of the Constitution itself, when it says in these claims against the State that the decision shall be merely recommendatory, it can be plainly seen that there would be no necessity for a recommendation to the Legislature if the Legislature had already provided for the payment; hence, the suit of *White v. Auditor* was properly brought in the Superior Court to obtain the construction of statutes and to have determined the question as to the amount and method of payment of his salary.

If you will examine the facts agreed in the case of *White v. Auditor*, in 126 N. C., on pages 573-4 and 5, and in connection therewith the Laws of 1899, chap. 19, secs. 2 and 9, you will perceive that White, by virtue of his office, was chairman of the Shell-Fish Commission under chapter 19, was entitled to a definite salary, payable monthly, and 5 cents a mile going to and returning from meetings, payable out of the oyster fund by the State Treasurer upon the warrant of the Auditor upon a certificate of the Secretary when countersigned by himself; it will also appear, from the opinion and the facts agreed, that the salary began to run at this rate from the 15th of March, 1899, and had been unpaid up to November 20, 1899, and that *White v. Auditor* was not decided until May 22, 1900; you will also see on page 119 of the printed record of this trial that the judgment rendered in favor of the plaintiff was for salary and compensation provided for in the Act of 1899, chap. 19, namely the sum of $400.00 per annum and 5 cents per mile for travel and extra expenses not to exceed $50.00 per annum as set forth in proviso in chapter 19, section 1, the same to be paid out of the oyster fund appropriated by the Act of 1897, and by the Acts of 1899 admitted to be in the Treasurer's hands.

It is intimated by the prosecution that the facts leave the amount due the plaintiff in uncertainty. A moment's examination will convince anyone that with these facts before the Auditor, with the time of service and mileage supplied him by the plaintiff and the Secretary of the Board, that it is a mere matter of calculation to ascertain the amount due the plaintiff from the 15th of March, 1899, till paid. *Id certum est quod certum reddi potest*—that is certain which is capable of being made certain.

If there was any discretion necessary for the Auditor to exercise in making the calculation to ascertain the exact amount due from March 15, 1899, at $400.00 per annum, or $33.33½ per month, the writ did not interfere with this discretion, nor did it interfere with

his discretion in ascertaining the expense account and mileage. Note the language of the writ: "You are hereby commanded absolutely and peremptorily without delay to proceed to audit said accounts upon their being so presented to you." Printed Record, page 120. "And that you at once upon auditing the same issue warrants therefor for such amounts as you shall find to be due." The writ does not direct him what amount, but quotes so much of the opinion as to limit him to $400.00 a year salary, expenses not to exceed $50.00, and mileage not to exceed 5 cents for each mile travelled when engaged in business, in other words, the amounts limited, as provided by the Acts of 1899.

There is no limitation whatever upon his auditing the accounts according to his own ideas, provided he does not exceed the statutory limit. He is at liberty to exercise his own discretion as to every item within the limitations of the act of the General Assembly and the opinion of the Court cutting down his salary and defining his legal duties under the act. So that if the Auditor had to exercise any discretion, the writ simply directed him to perform that duty.

This Court has held in case of *Koonce v. Commissioners*, 106 N. C., 199: "It is well settled that where County Commissioners are clothed by law with power to make or not to make any allowance at all to an officer for his services, as they may think best for the public welfare, the Court can not control their discretion by a writ of mandamus, but where they refuse to entertain the question or exercise the discretion given to them in reference to it, the Courts will enforce action by mandamus, where no other legal remedy exists."

But in this instance the duty of the Auditor involved no discretion —it was purely ministerial.

"When the Legislative Department has appropriated a certain fund to the payment of a liability incurred, or to be incurred, and the Auditor or Treasurer refuses to obey the legislative mandate, the Court can issue its mandamus to compel him to do so. The Court can not direct him to pay a claim, however just and unquestioned, when there is no legislative appropriation for that purpose." Clark, J., in *Garner v. Worth*, 112, at page 253.

"Even when a claim is an expense to the State Government, or other subject of appropriation, as an expense of a charitable or penal institution, for instance, the Court can only issue a mandamus when the amount is admitted, or ascertained, or stated by the statute as a salary or other sum certain, *i. e.*, when the act to be done is merely ministerial." Clark, J., in *Garner v. Worth*, 122-257.

Where there is an admission of the correctness of the bill presented and of the existence of a special fund for its payment, the remedy is a peremptory writ of mandamus to the Governor to issue

his warrant upon said special fund, if it had not been made to appear that he was ready to issue such warrant. *Journal Co. v. Boyd*, 36 Nebraska, 60. (Quoted by McRae, J., 115-173, at top.)

If there is a specific appropriation by statute of a sum certain to be paid, and a direction to the Auditor to issue warrant for same, there is but a ministerial duty to be performed, and in such case the writ of mandamus will lie. McRae. J., in *Burton v. Furman*, 115-172, at bottom, and citing *Sawyer v. Moore*, 59 N. W. Rep.,755 (Nebraska).

The Public Treasurer and Auditor are mere ministerial officers, bound to obey the orders of the General Assembly. It follows that the Courts have no power to compel, by mandamus, the public Treasurer to pay a debt which the General Assembly has directed him not to pay, or the Auditor to give a warrant upon the Treasurer which the General Assembly has directed him not to give, unless the act of the General Assembly be void as violating the Constitution of the United States, or of this State. *Wilson v. Jenkins*, 72-6. (Pearson, C. J.).

The 8th section of the Ordinance of the Convention of 1868, having provided that, when the President and Chief Engineer of the N. W. N. C. R. R. Co. should have complied with certain terms in respect to the first division of the said road, the Governor should direct that the Public Treasurer should make a loan to the company by the issue of a certain amount of State bonds, and the terms having been complied with, it was held, that the company was entitled to have a peremptory mandamus to compel the Treasurer to issue the bonds, notwithstanding the subsequent legislation contained in the Acts 1868-9, chap. 32, of 1869-'70, chapters 71 and 100, as all those acts taken together, left the ordinance above mentioned in full force and effect. Settle, J., in *R. R. v. Jenkins*, 65—173.

This opinion is quoted and relied on by Justice Clark as follows: "The power to issue a mandamus to the State Treasurer to execute an ordinance of the Convention, notwithstanding subsequent legislation, was held in *Railroad v. Jenkins*, 65—173. Mandamus to the Treasurer to discharge a purely ministerial duty was recognized in *R. R. v. Jenkins*, 68—502, and as to the Governor in *Cotton v. Ellis*, 52—545, and as to other officers in the case of *County Board v. State Board*, 106 N. C., 81, though, of course, it will not issue when any discretion by the officer is to be exercised." 120, N. C.

In an application for mandamus against the Comptroller of the State of California to compel him to issue warrants claimed by plaintiffs under a contract with the State, Chief Justice Field says:

"The Comptroller and Treasurer of the State are no more officers of that department than the Sheriffs and Tax Collectors of each

county. The powers of each are limited and defined by the law, and if either can not be compelled by mandamus to perform a duty enjoined by law in case of his refusal, none of them can be. Yet, it will hardly be contended that a Sheriff could not be compelled to execute a deed to a purchaser of real property at a sale under execution or a Tax Collector a deed to the purchaser at a tax sale. But if the position of the Attorney-General be tenable, when applied to the action of the Comptroller or Treasurer, it is equally so when applied to the action of the other officers of the Executive Department. The powers of the Comptroller and Treasurer differ from the powers of the other officers named only in their extent. The fallacy of the doctrine becomes apparent when it is thus tested. If it could be sustained, our government would cease to be one of law and sink into merited contempt for its inefficiency. No officer, however high, is above the law, and when duties are imposed upon him in regard to which he has no discretion, he can be required to perform those duties by the compulsory process of mandamus. This is the settled doctrine not only of the Federal Courts, but of the highest tribunal of nearly every State in the Union where the question has been raised." *McCauley v. Brooks*, 16 Cal., 40-41.

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing the mandamus is to be determined." *Marbury v. Madison*, 1 Cranch, 170.

Mandamus was granted against the Comptroller to draw warrant on the Treasurer for salary of the Supreme Court Reporter in case of *The People v. Whitman*, 6 Cal., 659. And also, to compel the Comptroller to correct an error in the auditing of an account in the case of *The People v. Bell*, 4 Cal., 177. *McCauley v. Brooks*, 16 Cal., 47.

The Supreme Court of New York awarded a mandamus against the Comptroller commanding him to issue his warrant to the Treasurer in the following cases: 18 Wendell, 659; 15 Barb., 529; 16 Barb., 503; 19 Barb., 468; 23 Barb., 339.

In *Page v. Harding*, 8 B. Monroe, 649, the Supreme Court of Kentucky affirmed the judgment of the Circuit Court of that State, awarding a mandamus to the Auditor of the State to compel him to issue his warrant in favor of the Secretary of State for the salary of the Secretary for a quarter of a year. The Court speaks as follows: "The judiciary pretends to no direct control over the action of the Legislature or the Supreme Executive. But it may decide upon the acts of either affecting private rights and by writ of mandamus it may coerce a ministerial officer, though of the Executive Department, to the performance of a legal duty for the effectuation of a legal right. It must decide all questions essential to a determina-

tion of the rights of the parties in a judicial proceeding, coming properly before it."

The Supreme Court of the United States, in the case of *Kendall v. United States*, 12 Pet., 24, affirmed the judgment of the Circuit Court of the District of Columbia awarding a mandamus to the Postmaster-General *directing him to credit the claimants with the amounts found due them by the Solicitor of the Treasury, holding* that the act required by the laws of Congress was purely ministerial.

It seems, Senators, that a mandamus has been held to be the proper writ for a member of the Legislature to compel the payment of his per diem, and as this case may be of some interest to you, I call your attention to it. The peremptory writ was awarded against the Comptroller of California in the case of *Fowler v. Pearce*, 2 Cal, 165. In that case, Chief Justice Murray said: "*The nature and amount of the services are ascertained, and the law has fixed the compensation. The Comptroller must audit the account according to the law in force, and it will be no sufficient answer to a mistake or refusal on his part to say he acted according to his discretion. The act of auditing an account under circumstances like these becomes merely ministerial, and can be enforced by mandamus. The objection that it is an indirect mode of suing the State is not substantial. When the Legislature has fixed the amount of compensation, the fund out of which it shall be paid, and imposed the duty of auditing and paying the same on any officer, they have given a remedy which may be enforced by the Courts of the State.*"

Chief Justice Field, in his very able opinion in the case of *McCauley v. Brooks* (which opinion probably caused his promotion to the Supreme bench of the United States), in which he directed a peremptory mandamus against the Comptroller to issue his warrants against the State Treasury to pay the plaintiff certain moneys alleged to be due him under a contract made with the State, in regard to the suggestion that sufficient moneys were not in the treasury to pay the debt, says: "*When the warrants are presented to the Treasurer, it will be his duty to apply to them the unappropriated money in the treasury, and to continue to apply such moneys as they are from time to time received until the warrants are fully paid.*" *McCauley v. Brooks*, 16 Cal., 47.

Can it be that other authorities are necessary? If so, I refer you to an opinion in which the power is set forth pointedly and emphatically.

In 1897, Governor Russell brought suit in Wake Superior Court against the State Auditor, asking for a peremptory writ of mandamus commanding the Auditor to prepare forms for listing property for assessors and list-takers under the Act of 1897, fixing the capitation tax in the lists at $1.38, instead of $1.29, as provided in

the act—the tax levy being 46 cents on the $100, and the poll-tax therefore only $1.29—the act thus failing to observe the constitutional equation. In an able dissenting opinion filed in the case, Justice Clark favors the issue of the writ to the extent of requiring the Auditor to put into the tax-lists the figures $1.38 to preserve the equation, instead of $1.29, as fixed in the act of the Legislature, and amongst other things says: "We find that the Legislature has also obeyed the constitutional mandate by levying a capitation tax. But as to this latter, we find that it is defective in that it does not come up to the requirement that it shall be equal to the property tax on $300. The simple duty asked of the Court is to say to the Auditor, *obey the Constitution and not the act of the Legislature. While placing in his blanks the certainly valid property tax of 46 cents, the Auditor should therefore be commanded to write in the column for capitation tax the $1.38 required by the Constitution, and not the $1.29 provided by legislative enactment.*" *Russell v. Ayer*, 120—193.

We have heard so much said about this writ of mandamus that one would suppose that it was something divine—too hallowed for use, too holy to take its name in vain! Long ago our Supreme Court held that it is no such sacred thing—that it is not now a prerogative or extraordinary writ, as it was considered in the days of its childhood, but is simply a writ of right to be used as ordinary process in any case to which it is applicable. It may redress the rights of an infant as well as those of a king. It has been so held in *Haymore v. Commissioners*, 85—268; *Brown v. Turner*, 70—93; *Burton v. Furman*, 115—166.

But it may be urged that an alternative and not a peremptory mandamus should have been issued. If the fund was in hand (and this was the fact admitted before the Court)—and White was entitled to the office and its emoluments (and this had been decided in *White v. Hill*)—the proper and only writ applicable was a peremptory mandamus. The Court has a pointed illustration of the circumstances under which the alternative writ issues, in that class of cases where creditors seek payments against counties. Where the creditor reduces his debt to judgment against the county, he is entitled to mandamus in the nature of execution to compel payment. After judgment, unless it is admitted by the county authorities that there are funds in hand to pay, it is usual to issue an alternative mandamus to let the county authorities show cause for delay, or for levying taxes. If the money is admitted to be in hand, the peremptory writ will issue; otherwise the alternative writ. It is for the benefit of the creditor, and may be issued or not as he may ask; the creditor may enforce a return to the writ or not, and for disobedience to it, may waive, or insist upon, process of attachment. The

reason that a judgment creditor against a county is required to resort to mandamus in the nature of execution to collect his debt, is, that it is against public policy to seize corporate property by ordinary execution. It is presumed that a solvent county or municipality will pay its debts when its revenues are in hand in excess of current expenses, but if the proper authorities delay payment and fail to give sufficient excuse for delay, the Court will enforce its judgment by peremptory writ or by attachment, at the instance of the creditor. But it will be seen that these alternative writs would be unnecessary and inapplicable where the authorities of the county or municipality admit a specific appropriation set apart for payment and still refuse to make the application. In this latter case the peremptory writ is unquestionably the remedy.

The judgment being regular, the writ logically follows. It has been said that "interest follows the principal as the shadow does the substance," so I assert that an execution as naturally follows a judgment. What account is a judgment without an execution? And of what value is a Court that fails to render a judgment agreeably to its convictions and to enforce it when rendered?

An execution has been defined to be "a judicial writ founded on a judgment, obtained in a civil Court and issued in behalf of the party recovering such judgment, for the purpose of obtaining the satisfaction or full benefit of it." Lord Coke speaks of it as the "life of the law" and "the fruit and life of every suit." Judge Pearson speaks of it as the "soul of the judgment."

If the opinion in *White v. Hill* is the law, then the decision in *White v. Auditor* logically follows. When the judgment in *White v. Auditor* was filed in the Supreme Court, under Rule 51 of that Court, the plaintiff had the lawful right to have the execution issue, and the Clerk was fully empowered and authorized, in the absence of a request by the plaintiff, to issue the mandamus as required by the judgment. I specially call the attention of the Senators to the rule and request them to read it. Clark's Code, p. 941, Rule 51.

The authority and power to issue the writ dates from May 22, 1900. The delay of plaintiff was explained by Colonel Harris. It was because the vouchers were not ready.

It is not my purpose to dwell upon the several conversations between the Judges, and between Colonel Kenan and the Judges, in regard to the issuance of the writ soon after the Court convened in the fall of 1900. At any time after May 22, 1900, it was the duty of the Clerk to issue the writ in obedience to the judgment upon the demand of the plaintiff. When one of the Judges, however, suggested to him in October not to issue it, it can be seen why he hesitated. He was a courteous gentleman, and desired only to do his duty. The case had gone off the docket. Under the rules of the

Court, no other official act could be done by the Court agreeably to the procedure of the Court, except by motion in writing. (Rule 45.)

This was never done in the regular way, and was never acted upon by the Court. Advice of the members of the Court could not change the opinion and judgment. The judgment was never changed. It is the same in terms to-day it was May 22, 1900.

After the Clerk obtained the individual suggestions of a majority of the members of the Court as to his powers and duties under the judgment, he issued the writ. Nobody could have complained if he had issued it without saying a word to the Judges, for their duty in regard to it ended May 22.

In the case of *James v. Railroad*, 123—299, it was held by a unanimous Court, that the Supreme Court had a supervisory power over the Superior Courts, and could compel them by mandamus and other writs to obey its judgments and orders. It also held that *when the Supreme Court had certified its decision down for judgment it had no further jurisdiction in the case; that it has no power to change or modify its judgments rendered at a former term*, except to correct inadvertence or mistakes. *Murphy v. Merritt*, 63—502; *Moore v. Hinnant*, 90—163; *Cook v. Moore*, 100—294. *And that a judgment having been entered, no other judgment can at a subsequent term be entered. Moore v. Hinnant*, 90—163. These authorities are in point, and dispose of Specification No. 5 in article four as to any legal right being denied, or law violated, as to the filing the protest and dissenting opinion in October, 1900.

VENUE—PROCEDURE—FURTHER ANSWERING IN THIS CONNECTION ARTICLE ONE AND ARTICLE FOUR.

But the prosecution says that the suit, or controversy without action was brought in Perquimans, the home of the plaintiff, instead of Wake, the home of the defendants, and that it was irregular and the Court should have taken notice of this. To put this out of the way, I refer you to Clark's Code, 3d Edition, sec. 195: "If the county designated for that purpose, in the summons and complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, before the time of answering expires, demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties or by order of Court."

And the Supreme Court says: "If no objection is taken to the venue in the Superior Court, it can not be taken in the Supreme Court on appeal. *Devereux v. Devereux*, 81—12. If objection is not taken below, trial can proceed in that county. *Cloman v. Staton*, 78 N. C., 236."

But the prosecution insists that you should condemn the respondents because the proceeding was not begun by summons, sworn complaint and answer. I refer you to Clark's Code, sec. 567, and the opinions there cited to dispense with this contention. I refer to one decision which says: "The purpose of the section is simply to dispense with the formalities of a summons, complaint and answer, and upon an agreed state of facts to submit the case to the Court for decision. *McKethan v. Ray*, 71—165; *Little v. Thorne*, 93—69. Judgment can be entered in such cases by consent of the parties, as was done in this case, in vacation." *Hervey v. Edmonds*, 68—243.

The evidence is unquestioned that both parties were represented by counsel before the Supreme Court—that the Court was informed that the controversy was submitted in good faith to determine the rights and duties of the parties,*and that no technical objections were raised by counsel to direct the attention of the Court to anything except the merits of the case, and it was heard regularly upon the merits, an adversari taken, and the opinions filed five months after argument.* Nothing is put upon any of these grounds by the learned Judges in their dissenting opinions.

Is it possible that these technicalities in legal practice and procedure, not relied on by counsel in the Court below or above, which were not regularly presented to the Court, and which *no member of the Court therefore noticed, or should have noticed, in rendering their opinion*, shall now be urged to incriminate these respondents? What interest did they have in White and his five cents a mile, except to lawfully determine, if possible, his legal rights? They did not know White. Officials of the State were before them represented by counsel asking for an opinion upon a law question upon facts agreed, and which the Court could not change or modify. The record imported verity. They were bound by the facts it set forth, and their duty was to declare the law upon it as they understood it. They did this. They could do nothing less. They did nothing more.

Senators, my associates have shown that the decision in *White v. Hill* is supported by precedents running back sixty-eight years, that four members of the Court held White entitled to his office and salary after the passage of the acts of 1899, and that *White v. Auditor* logically results from the decision of *White v. Hill.*

If these decisions are the law, supported as they are by so many precedents, you can not do otherwise than acquit these respondents. But if your understanding of the law is different, or if you would have reversed the precedents and decided otherwise than these respondents did, we insist that you will credit them with absolute good faith and acquit. Because they both swear that they acted in good faith and with honest intentions, and the evidence of Justice Montgomery confirms their statements, and their statements are

confirmed by testimony incontrovertible which is found in their consistent opinions which have been written and appear in the Reports from 1895 down till the last line in the thirty-nine office-holding cases was written.

Specifically answering Art. II.:

The second article charges respondents with the assumption of legislative functions, and intending to bring the General Assembly into direpute and contemptuously violating and defying Chapter 21, Laws of 1899, especially this provision:

"The Treasurer of the State of North Carolina shall not pay any compensation to any person or persons claiming the same for services rendered concerning the shell-fish industry, unless such person or persons are authorized to render such services under the provisions of said act, entitled 'To provide for the general supervision of the shell-fish industry of the State of North Carolina,' and ratified March 2, 1899."

Chapter 21 was ratified six days after chapter 19, and is supplemental to chapter 19.

The contention of the prosecution is that chapter 21 forbade payment to White by implication, if not by express words. To quote from Judge Allen, he thinks that "it can not be doubted that the same power which makes an appropriation, can withdraw it, and that although the Legislature may have provided for the payment of this claim, that when it is said that the claim could not be paid, it was not within the power of any Court to compel payment."

This argument fails because chapter 21 does not forbid the payment of White's salary and expenses; the person who makes the claim under chapter 21, must be a person who is authorized to render the services under chapter 19; the person forbidden to make the claim is he who is not authorized to render the services under chapter 19. Construing the Laws of 1897 and 1899 relating to the same subject-matter together, the Supreme Court held in *White v. Hill*, four Justices concurring, that White had a term of four years in his office, which had not been abolished —that it was his duty to render the services of Chairman of the Shell-Fish Commission and the other duties under chapter 19. In his suit for his salary in *White v. Auditor*, his claim is for services under all the acts in force and not repealed, and Judge Furches expressly says that as he is in office and required to perform the services under chapter 19, it is not necessary for the Court to pass upon the validity of chapter 21 and say whether it is constitutional or not. This deferential and reasonable construction of the statutes by the Court—construing every section and clause of the acts of 1899 to be and to remain in full force and effect in every respect, except only in so far as the effect of chapter 18 was to take away

the vested rights of White to the remainder of his term—is now sought to be converted into an infamous offence and a contempt of legislative power. Every one of these laws are now in force, unless the present General Assembly repealed them. The Court has done nothing to interfere with their full and complete prospective operation. If the term of Captain White, of the steamer "Lilly," has expired—and I understand it has—Captain Hill, or his successor, can go on board and sail the seas of all oysterdom within his jurisdiction, with none to molest or make him afraid!

If *Hoke v. Henderson* is the law, *White v. Hill* is the law. If *White v. Hill* is the law, White was entitled to his term and pay fixed by the law, and hence *White v. Auditor* is the law.

If these precedents are founded in principles so numerous, why will it be urged that these respondents are guilty of any wrong?

The prosecution relies upon *Wilson v. Jenkins*, 72—5, to sustain their contention that the mandamus could not issue under the provisions of chapter 21. The case does not fit for several reasons:

1st. Chapter 21 does not forbid payment to White.

2d. Because White's office and salary were not taken away by any of the acts, and could not be as long as the duties continued.

3d. If chapter 21 could be construed to have this purpose, the fact that White had a vested right in the balance of his term and a salary fixed and specially provided for by law, gave him a vested right in his office and salary thus provided for, and chapter 21 could not take it away from him.

4th. The resolution of June 14 did not forbid payment to White, but simply caused inquiry of the Treasurer if he had paid him.

So the Supreme Court did not think it necessary to pass on the constitutionality of chapter 21, and did not do so as affecting the salary of White. The Court allowed all the statutes unrepealed to stand, and White was required to respect all the laws of the General Assembly, and was allowed his pay as specially provided for out of a definite fund specially appropriated in section 9, chapter 19, Laws of 1899.

But if the law is different from what the Supreme Court declared it to be, in deference to the General Assembly, as anyone can see by reading Justice Furches' opinion in *White v. Auditor*, and it is as contended for by the prosecution, that is, that chapter 21 had the effect to abolish White's salary and take away the appropriation for services rendered, I respectfully contend, upon the highest authority, that the Legislature could not do this, and if this was intended, the act is void, and the Supreme Court could have so declared, though it did not do so.

White had a term for four years under the act of 1897. About two years of the term was unexpired in 1899. The Supreme Court

says the acts of 1899 are all right and shall be obeyed as to every line and letter, except that White is entitled, under *Hoke v. Henderson* and *Wood v. Bellamy*, to have the property in the balance of his term and his salary as agreed on between himself and the State for services rendered and to be rendered.

The prosecution says the Supreme Court is wrong, and intentionally so, in thus deciding. It is claimed that White's office and salary were abolished. We say this is error.

The duties remained. It may be there was an intention to distribute them amongst seven men, but this could not be done by the Legislature so as to displace White unless *Hoke v. Henderson* and *Wood v. Bellamy* were set aside. The act could and would be effective prospectively but not retrospectively, so as to destroy vested rights.

If the acts of 1899 were intended to oust White and continue the office in Hill and others, it is clearly in conflict with *Hoke v. Henderson*, unconstitutional and void.

If it was intended to abolish White's term and divest his emoluments, earned and to be earned under the appropriating acts providing for his pay, or to continue the office and destroy his remedy, chapter 21, in such case, would impair the obligation of a contract, and be null and void.

The Constitution of the United States declares that "No State shall pass any law impairing the obligation of contracts." The contract is the agreement of minds, upon a sufficient consideration, that something specified shall be done, or shall not be done. "Impair is to make worse, to diminish in quantity, value, excellence or strength; to lessen in power, to weaken, to enfeeble, to deteriorate." The obligation of a contract includes everything within its obligatory scope. "Among these elements nothing is more important than the means of enforcement. This is the breath of its vital existence. Without it the contract, as such, in the view of the law, ceases to be. * * * The idea of right and remedy are inseparable. Want of right and want of remedy are the same thing. * * * The proposition seems to us too clear to require discussion. It is also the settled doctrine of this Court that the laws which subsist at the time and place of making a contract enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This rule embraces alike those which affect its validity, construction, discharge and enforcement." *Von Hoffman v. Quincy*, 4 Wallace U. S. Reports, 552; *McCracken v. Hayward*, 2 How. U. S. Reports, 612.

One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not by the Constitution to be impaired at all. This is not a question of degree, or manner, or cause, but of encroaching in any respect on its obligation--dispensing with any part of its force.

These rules are axioms in the jurisprudence of the Supreme Court of the United States and of the States of the Union. Stay laws are void because they are in conflict with the National Constitution by operating solely on the remedy,, making the debt less valuable to the creditor. *Jacobs v. Smallwood*, 63 N. C., 112; *Jones v. Crittenden*, 1 Car. Law, 385; *Barnes v. Barnes*, 8 Jones, 366.

The obligation of a contract can not be substantially impaired in any way by a State law. This restriction is beneficial to those whom it restrains as well as to others. No community can have any higher public interest than in the faithful performance of contracts and the honest administration of justice.

"The inhibition of the Constitution is wholly prospective. The States may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect." *Edwards v. Kearzey*, 79 N. C., p. 668 (reporting opinion of Justice Swayne of the Supreme Court of the United States). Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution." *Greene v. Biddle*, 8 Wheaton, 92.

The honorable gentleman who opened the case for the Managers stated that, conceding the fact that an appropriation had been made for the payment of the salary of White by the act of 1897, and chapters 18 and 19 of the Laws of 1899, still such appropriation was repealed by chapter 21; and that the Legislature had at any time the right to repeal any appropriation theretofore made. We do not believe that this general proposition is a sound one; but even if it were, it does not fit the facts in the case, for chapter 21 can by no construction be converted into a repeal of any appropriation. The repeal of an appropriation means the covering of the appropriation back into the general fund of the treasury, and is the utter annihilation of the appropriation—as such it no longer exists, and therefore no one can be paid one cent out of it.

Now, chapter 21, neither in words nor even by inference, does this. It says that no one shall be paid except a certain class of persons, thereby plainly providing by its very terms that that particular class of persons can be paid out of the appropriation in the future. No one can be paid out of an appropriation which does not exist, and therefore by its provisions chapter 21 recognized the appropriation as not repealed but still existing.

Therefore, in ordering White paid, the Supreme Court neither ordered him paid out of an appropriation which never existed nor out of one which had been repealed, but ordered that he be paid out

of an appropriation which chapter 21 itself expressly recognized as having been made and still existing. Yes, the appropriation was there, recognized as being there by the Legislature when it passed chapter 21 in reference to it—recognized as existing by the Treasurer in the facts agreed in *White v. Auditor*, recognized as existing by the Supreme Court in its opinion, its final destination only being in controversy, but its existence never questioned until this trial.

The act of the Legislature construed by the Court in *Wilson v. Jenkins*, 72 N. C., 5, and the resolution construed in *Shaffer v. Jenkins*, 72 N. C., 275, the two cases relied on by the other side, were entirely different from chapter 21. In both of these cases the Legislature withdrew the appropriation by forbidding its payment to anybody at any time under any conditions—positively and for all purposes wiped it out of existence—while chapter 21 merely directed to what class of persons an existing appropriation should be paid.

These cases do not fit the facts of this case. Note the diversity. Judge Rodman, in concluding the opinion in *Shaffer v. Jenkins*, uses these words: "If the Legislature, by way of contract, has specifically appropriated a certain fund to a certain debt, or to a certain individual, or class of individuals, and the State Treasurer having that fund in his hands and refusing to apply it according to the law, he may be compelled to do so by judicial process."

Yes, compelled to do it, as in this case, by mandamus. This is our case. *Shaffer v. Jenkins*, 72 N. C., 280.

A notable case in point is *McCauley v. Brooks*, 16 Cal., 24. The State leased the State Prison and grounds for a period of five years at a price not exceeding $15,000.00 a month, payable monthly by the Treasurer of the State on application in writing by the lessee. Appropriation was made by the Legislature out of money in the Treasury not otherwise appropriated; the lessee took possession, and by himself and assigns performed his part of the contract; subsequently the Legislature passed an act requiring the lessee and all others to obtain the approval of the Board of Examiners in order to obtain warrants for monthly installments, whereas under the original contract warrants were obtained upon the written application of the lessee; the Board of Examiners refused to approve vouchers, and the Treasurer to pay under these subsequent acts. Thereupon the plaintiff brought his action for a mandamus against the Comptroller of the State to compel him to issue warrants for his monthly dues; the Comptroller, representing the State, contested the writ, 1st, because there was no unexhausted specific appropriation by law to meet the same; 2d, because the claims had not received the approval of the Board provided in the new act, to-wit, the Board of Examiners; 3d, that the law under which the contract was made and which directed him to issue the warrants had been repealed.

Chief Justice Field, afterwards an Associate Justice of the Supreme Court of the United States, in delivering the opinion, amongst other things, says: "To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the Treasury. * * * The absolute right to the warrants thus secured (at the end of each month) can not be changed by any subsequent legislative enactment so as to make their issuance dependent upon the will and discretion of any board established by the State. The Legislature might as well make the issuance of the warrants depend upon an impossible condition. The imposition of any condition not provided by the terms of the original contract is not within the Constitutional power of the Legislature. Any law attempting to make such imposition is invalid as impairing the obligation of a contract."

We respectfully insist, Senators, that it is your duty to acquit these respondents on the second article as well as on the first. The considerations which acquit them so fully on the first and second charges, also acquit them on the third and the fourth.

With regard to the fifth specification in Art. IV., I refer you to *James v. Railroad*, which I have cited in my argument under the first article, wherein the Court has expressly held that it could not make an order in the cause at a subsequent term after filing the opinion. To do so is contrary to the decision and the precedents.

The prosecution never offered to prove by Justice Clark that he had a right under the rules and the decisions of the Court to file either the protest or the dissent in October, 1900. They proved that he offered to file them. That is all. The practice and the case of *James v. Railroad* show conclusively that there was no legal right denied.

I respectfully submit that you should acquit the respondents without a moment's hesitation as to all of the four articles.

We are confronted finally with the fifth article—

The last and final charge made against the respondents is, in substance, that at various times and in numerous decisions, commonly known as the office-holding cases, they persistently, wilfully, unlawfully and intentionally attempted to bring into contempt, disrepute and public scandal the General Assembly of North Carolina and to nullify and render of no effect the acts thereof by a specious course of reasoning, declaring the acts of the Legislature unconstitutional in whole or in part, as suited their purpose, and disregarding the true intent of the same for the purpose of annulling and defeating the legislative will.

The respondents emphatically and utterly deny each and every one

of the allegations in the fifth article, as they do in all the others, and they especially assert that in rendering opinions in these cases they were not influenced by partisan or political considerations. This general and sweeping charge is intended to cover the entire official life of these respondents upon the bench. In indictments in the Superior Courts there is sometimes a count put in the bill as a kind of saving clause and this count is commonly called by the lawyers the "drag-net," or "*omnium gatherum.*" The fifth article is so general in its allegations that it fails to furnish a charge in specific terms so as to enable me to comprehend its meaning, unless it is intended to charge that in every opinion written by these respondents in these office-holding cases they were actuated by the malign purpose attributed to them in the general terms of the article. Fortunately for the respondents, all of the decisions of the Supreme Court are in evidence. Every opinion which either one of them has written in these cases, or concurred in, is a matter of history and speaks its own story. The record is too long to read; but, Senators, it is your duty to read these opinions. There are thirty-nine of them. In twenty-three these respondents either wrote or concurred in opinions which ruled in the Democrats and ruled out the Republicans or Fusionists. In about sixteen of them the effect of the decisions was to retain in office or to give the emoluments of the office to those who were of the same political faith as the respondents, but the opinions were based upon legal principles which were the same in substance in all respects as those principles which hitherto retained in office the adherents of the political party different from that to which the respondents belonged.

When Judge Furches wrote the opinion which excluded his political friend, Judge Cook, from the bench in the case of *Cook v. Meares*, was he moved by partisan bias to annul and defeat the legislative will and to trample upon the Constitution? When these respondents concurred in the opinions rendered in *Wood v. Bellamy* and *Lusk v. Sawyer*, and *Person v. Southerland*, was it their intention to annul the act of the General Assembly for the purpose of defying the Legislature? The Legislature which had attempted to abolish by its acts the offices of the Democrats then in control of the Hospitals and Asylums of the State no doubt intended to turn over the control of all of these institutions into the hands of the same political party to which these respondents belonged. If political bias ever furnished an excuse for a Judge to render an opinion favorable to his friends, the hour for these respondents had now arrived. Did they embrace it? The decisions in these cases speak in thunder tones a complete and unanswerable refutation to every charge or intimation that the respondents were actuated by political bias. Is it not public history that when the decision in *Wood v. Bel-*

lamy was written and concurred in by these respondents, that the action of the respondents was commended by the considerate and unbiased judgment of thoughtful men throughout our borders? If the principles as laid down in *Hoke v. Henderson* and *Wood v. Bellamy* were good law when written, then any just and thoughtful man who will trace the reasoning and conduct of these respondents in connection with every office-holding case from that time until the last opinion was written in these cases, can find complete justification of these respondents in everything they said and did in connection with these troublesome questions.

When the political storm that swept the Democracy from power and made possible the Legislature of 1897—a Legislature which undertook to wrest from the control of the defeated party every public institution of the State—the decision in *Wood v. Bellamy* stood like the rock of Gibraltar against the rush for change and official positions. We praised Judge Furches and Judge Douglas then, we can not condemn them now. As that opinion was then our fortress, it should now be their shield. It has been written in the Book of Books—"And a man shall be as a hiding-place from the wind and a covert from the tempest; as rivers of water in a dry place; as a shadow of a great rock in a weary land." In all fairness, shall not the honest opinion of these respondents in *Wood v. Bellamy* now be for them "a covert from the tempest and a shadow of a great rock in a weary land"?

The motives of the respondents are assailed in the opinions which they have delivered in these office-holding cases. They are accused of specious reasoning. By adverting to their opinions it will be seen that in construing the statutes of the Legislature they have followed out the rules and reasoning which were suggested to them by the learned counsel who appeared for the Democratic office-holders in the cases of *Wood v. Bellamy*, *Lusk v. Sawyer*, *Person v. Southerland*, and these briefs appear in the record of this trial on pages 52, 53, 54 and 55. It will be seen also that in construing statutes that they followed the rules of the Judges for ages past.

CONSTRUCTION OF STATUTES IN PARI MATERIA.

It is familiar learning that all acts of the Legislature passed at the same session of the Legislature are to be considered as one statute—the revised statutes passed at the session of 1836 were held to constitute one statute. See the opinion of Daniel, Judge, in the case of *State v. Bell*, 25—377, which opinion was approved by Dillard, Judge, in *Roads v. Lewis*, 80—139.

Again, under the Acts of 1831 and 1835, relating to the County Court of Brunswick, the magistrates—about fifteen in number—were directed by the act of 1835 to divide themselves into classes

for holding courts, and no number less than a majority could levy a tax, but this classification and provision was never made, and a majority failed to act in making levy. In a suit testing the validity of the action of the justices—less than a majority having levied the tax—the Supreme Court held that the act of 1835 is *in pari materia* with the act of 1831. The law does not favor implied revocations, and they are not allowed unless the repugnancy is plain; that where in the sixth section of the acts of 1831 there was a provision giving to any three magistrates power to do any act which in 1831 was required to be done by a majority of the acting justices, and this section was omitted from the Acts of 1835, the Acts of 1835 shall not have the effect to repeal section 6 of the Acts of 1831, but that taxes levied by three justices are valid. Nash, Judge, delivering the opinion. *State v. Woodside*, 31—499. Approved, Ashe, Judge. *Muller v. Commissioners*, 89—176.

In the construction of a statute, other statutes made in *pari materia*, whether referred to or not in that under consideration, will be taken as one system and so considered. In this case the Court construed the Acts of 1838 with the Acts of 1836. If they related to the same subject-matter, whether expressly referred to or not, they must be taken to be one system and so construed. Nash, Chief Justice, in *State v. Melton*, 44—49.

Again, it has been held that when the meaning of the act is ambiguous and doubtful, it is the object of judicial investigation and the duty to ascertain the intention of the Legislature which framed the statute. *Simonton v. Lanier*, 71—502. The rule is that statutes *in pari menteria*—that is, upon the same subject—though made at different times and not referring to each other, are to be taken together as one system and as explanatory of each other.

Again, Justice Avery says in the case of *Winslow v. Morton*, 118—491, that the Courts have unanimously given their sanction, first, to the proposition that the law does not favor the repeal of an older statute by a later one by a mere implication; the implication, in order to operate, must be necessary, and if it arises out of the repugnancy between the two acts, the latter abrogates the older only to the extent that it is inconsistent and irreconcilable with it.

And so it was said by Justice Clark in 117—754, the re-enactment by the Legislature of a law in the terms of a former law, is not, in contemplation of law, a repeal, but is a re-affirmance of the former law whose provisions are those continued without intermission. These respondents contend that whenever the construction of statutes has been before them, whether relating to office-holding cases or other matters, that they have consistently endeavored to follow the long line of decisions in which their predecessors had established rules of interpretation.

OPINIONS OF ERSPONDENTS IN OTHER CASES THAN OFFICE-HOLDING CASES—THEIR CHARACTER AND THAT OF THE LATE CHIEF JUSTICE.

In these assaults upon the respondents, every delinquency charged relates to some opinion rendered in a contest for an office, or its emoluments. A stranger among us witnessing this struggle going on for five years in contests for office, or over statutes passed abolishing offices, or statutes re-creating offices, or *quo warrantos* employed to establish titles to offices, or writs of mandamus to enforce payment of salaries of officers, or this impeachment invoked touching opinions involving titles and salaries of officers, will doubtless come to the conclusion that the chief employment engaging our attention in North Carolina is the scramble for an office, either at the door of the Legislature or at the bar of the Courts. These respondents are not responsible for the statutes abolishing offices, or making transfers, or attempted transfers, from one person to another. They could not influence legislative action originating contests over titles to office in the Courts. Time and again these cases have been carried before them where they, and their asso cites, have been required, under oath, to solve delicate and troublesome questions, and where at times the clash between litigants has aroused bitterness and party feeling. Gladly would they at all times have escaped the responsibility if they could. In every one of the cases the Court was compelled to construe the meaning of some act of the Legislature. Naturally, the defeated contestant would blame the Court for its construction of the statute when the construction resulted unfavorably to himself.

I beg to pause a moment, Senators, and inquire if these respondents have delivered any other opinions than those relating to these offices. The Reports are all before you in evidence. Eleven volumes are filled with their opinions, either written or concurred in by them, affecting all sorts of rights, including life, limb, reputation and property, and not a word of censure, or criticism, is uttered against these respondents in respect to any of their opinions or conduct except as to these office-holding cases, and the criticism as to these is confined to the sixteen or seventeen cases out of the thirty-nine decided, which were unfavorable to the parties seeking redress in these sixteen cases, and who happened to belong to a different political party from that of the respondents.

Suppose we grope no longer in this dark valley of suspicion and crimination. Let us shift the scene for a moment and examine and see if we can not pause along the journey and find something in their conduct through all these years for commendation—some great, substantial service they have rendered the State and mankind—whether they have not construed the Constitution and the acts of the Legislature relating to questions of more transcendant importance than

those involved in this controversy of White for his four hundred dollars salary.

If you will turn to Art. II., section 14, of the Constitution, you will find this provision: "No act shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the payment of any debt, or to impose any taxes upon the people of the State, or to allow the counties, cities or towns to do so, unless the bill for the purpose shall have been read three several times in each House of the General Assembly, and passed three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the yeas and nays on the second and third reading of the bill shall have been entered on the Journal." The vital question as to whether the State in its sovereign capacity could, in the Constitution, safeguard the taxpayer against State and municipal indebtedness by legislation passed under this section, with additional formalities to those required in ordinary legislation, was first presented for review in the Supreme Court in the case of *Bank v. Commissioner*, 119 N. C., 214, when the Court held that this provision of the Constitution was mandatory and must be complied with by the Legislature to validate indebtedness created under its acts and purporting to be passed in pursuance of this provision of the Constitution. In this case, in the 119th, the validity of $20,000 was involved. Afterwards, in the case of *Charlotte v. Shepherd*, the validity of $250,000 of bonds were involved and upon the same principle. Again, in the case of *Commissioners v. Snuggs*, the validity of $100,000 of bonds of Stanley County were involved upon the same principle. And still again the validity of $100,000 of bonds of Wilkes County was involved in the case of *Commissioners v. Call.* In every one of these cases the duty was imposed upon the Court to construe the Constitution and the act of the Legislature under which the bonds were issued. Notwithstanding the very able opinion in *Bank v. Commissioners* (Justice Clark being the mouthpiece of the Court) was sustained by authorities cited from thirty States, the opinion was sharply criticised and widely discussed. The other cases which I have mentioned, following and affirming the principles in *Bank v. Commissioners*, had the effect to invalidate the $100,000 of Stanley County bonds, the $100,000 of Wilkes County bonds, and either to prevent the issue or invalidate the $250,000 of bonds of the city of Charlotte. These decisions attracted the attention of the business and legal world. The result was that the bondholders went into the Circuit Court of the United States and sought there to avoid the effect of these decisions by the circuitous route through that Court and the Circuit Court of Appeals, and thence to the Supreme Court of the United States, and this litigation is still

pending. His Honor, Judge Simonton, of the Circuit Court, delivered an opinion which was in direct conflict with that of our Supreme Court in *Commissioners v. Snuggs* and the other cases. Finally, one of these cases did reach the Supreme Court of the United States, and we have the information through the press, since you began your deliberations in this trial, that the Supreme Court of the United States has sustained the construction put upon the Constitution and the acts of the Legislature by our Supreme Court in these cases. It seems, therefore, that the highest judicial tribunal in the United States has respect for the opinions of these Judges.

When the Legislature of 1899 passed an act which ostensibly repealed the Railroad Commission act and created the Corporation Commission. The Corporation Commission, under the Act of 1899, issued an order under what they supposed to be their authority, assessing railroad and telegraph property in this State for taxation at the sum of $42,102,002.67, thereby increasing the valuation over the assessment for previous years in the sum of $9,579,081.47. This was done in June, 1899. In the months of August following, the railroads obtained a temporary injunction from Judge Simonton in the Circuit Court of the United States restraining the Corporation Commission from assessing or collecting these increased taxes, on the ground that the act of 1899 creating the Corporation Commission did not confer upon the Commission any authority to assess such property or levy the taxes. And on the 3d day of November, 1899, he filed a decree making the injunction perpetual on this ground alone. At this time there was pending before the Supreme Court of this State a suit between Dr. Abbott and Mr. Beddingfield as to which was entitled to hold the office of Corporation Commissioner. On the 21st of November, 1899, the Supreme Court filed its opinion in this case, and amongst other things held that upon a construction of all the statutes *in pari materia* relating to such taxation, that the Corporation Commission did have such powers of assessment of taxes. This opinion of our Supreme Court was called to the attention of Judge Simonton by a proper proceeding, and on the 10th day of January, 1900, he filed another decree and reversed his former ruling in deference to the ruling of the Supreme Court. So the construction of the statutes *in pari materia* by these respondents, and their associates who agreed with them, had the effect to increase the tax assessment of the railroad and telegraph companies $9,579,081.47 annually and continually thereafter, until changed by law. Net result: Abbott was allowed to hold out the balance of his term in office, but the State got its taxes on nearly $10,000,000 added annually to its taxable values.

Jeremiah S. Black, one of the most eminent lawyers of any age,

delivered a speech before the Judiciary Committee of the Senate of Pennsylvania in 1883 upon the subject of "Corporations Under Eminent Domain." In that great speech he announces the following principles: That common carriers, such as railroads, are not the owners of the railroads—that it is the duty of the State to open thoroughfares of trade and travel, and that the State may take the property of the citizens and pay for the work out of her own treasury—that when this is done she may make it free to all comers, or reimburse the cost by special tax upon those who use it—or she may permit the road to be built and opened by a corporation, or an individual, and pay for it by permitting the builders to collect tolls or taxes from those who carry or travel on it—that the proprietary right, however, to the railroad remains in the State and is held in trust for the use of the people—that those who run the railroads are always public agents—that to concede that the proprietary right, or title, to railroads is vested in the agent or corporation is as preposterous as to assert that the public roads of the county are the private property of the supervisors—that railways are public highways, and in no sense private property.

The State of North Carolina built a railroad at immense cost, known as the Western North Carolina Railroad. It had been granted most liberal franchises by the State. In 1884 it executed two several mortgages to the Central Trust Company of New York upon all of its property and franchises. In 1894 it consented to its extinction without the consent of the State. It allowed itself by a consent decree to be exposed upon the block to the highest bidder, and a foreign railroad company became the purchaser. After it had permitted itself to be conveyed by a deed with all of its property and franchises to a foreign corporation, a suit was brought against it in the case of *James v. Railway*, reported in the 121st North Carolina, 524, and the question was presented in this case to our Supreme Court as to whether a foreign corporation can acquire the franchises and property of a quasi public corporation at a sale under a decree of foreclosure without express authority of the General Assembly, and whether such sale would have the effect under sections 697 and 698, and other sections of The Code, to dissolve and extinguish the Western North Carolina Railroad and deliver it over bodily into the hands of the foreign purchaser. In short, could this company, clothed with a portion of the State's sovereignty and subject to the control of the State, without the consent of its creator, die on North Carolina soil, be buried, resurrected, expatriated, and begin life anew in the pocket of a foreign corporation and beyond the control and visitorial powers of the State of its original creation. When these great questions came up for review before the Supreme Court, the Court, through Justice

Furches, delivered a unanimous opinion, in which they construed the meaning of sections 697 and 698 of The Code, which were enacted in 1872, and section 701, passed in 1879, and sections 1936 and 2005, passed in 1871, and, construing these acts *in pari materia*, the Court held, amongst other things, that the sale under the mortgage did not make the Southern Railway Company, the purchaser, a domestic corporation—that the sale did not have the effect of a dissolution of the Western North Carolina Railroad Company—that there should have been provided a domestic corporation to take the place of the Western and assume and discharge its obligations to the public, and until that was done the Western continued in existence and was liable to the public for its use and any maladministration by the foreign railway company in the Courts of North Carolina. The beneficial effects of this opinion by Justice Furches, which is in harmony with the views of Judge Black as to the relationship between the people, the State and the railroads, will be of untold value to future generations.

The decision in the James case is the germ out of which grew the Craig act. The Craig act was one passed by the Legislature in 1899, having for its object the domestication of foreign corporations. Its author is the honorable Manager who introduced the resolution in the House of Representatives to impeach these respondents. The act met with fierce opposition in certain quarters, and the first case brought to the Supreme Court to test its validity and constitutionality was the case of *Debnam v. Southern Bell Telephone and Telegraph Company*, reported in 126—831, and here I pause to allude to something which to my mind is pathetic. On May 22, 1900, the decision in *White v. Auditor* was filed. On June 14th, 1900, the resolution referred to in the articles was passed by the Legislature. At that time Judge Furches had gone to his home in Statesville, and Judge Douglas had remained with two other Judges to complete certain unfinished work of the Court. When on the stand Judge Douglas informs us that about the time the resolution was passed on the 14th of June he was preparing the opinion in Debnam's case. It is a very able opinion, in which he has striven most zealously to uphold the validity of the Craig act. From his opinion in that case, which is the opinion of the Court, the telephone company has appealed to the Supreme Court of the United States. If this opinion is finally sustained by the Supreme Court of the United States, its benefits to the public will be of incalculable value for all time.

Judge Douglas exhausted the field of investigation to support the validity of this act passed by the Legislature of 1899, and yet he, and his associates, are accused of defying the will of that Legislature! And one of the chief accusers is the author himself of the act which was, perhaps, the most important law passed by the Gen-

eral Assembly of 1899. Truly may Judge Douglas exclaim in this Senate as Cæsar of old did in the Senate of Rome, *et tu Brute!*

The respondents are not accused of treason, of bribery, or drunkenness, or other immorality. If they are bad men, tell me where is the motive to influence their action in the White claim? Men do not do evil things without motive. When great questions, such as I have mentioned, have been before them, if they had motives for self-advancement or betrayal of trust, how abundant were the opportunities and how great might have been the temptations to a dishonest official. But in the decision of the multitude of cases of vast moment to the State and the people—concerning none of these do we hear a breath of calumny.

Judge Douglas is the son of a lawyer, jurist, statesman. His distinguished father was in his day the head of the great Democratic party in the Union and the stalwart friend of the South and its institutions. He is the son-in-law of a North Carolinian who, as a lawyer, scholar and jurist, was but lately gathered to his fathers crowned with honors and the esteem of his countrymen. A man who has been brought up and who has lived under the inspirations of such environments is not the man to dishonor the names of his fathers and disobey the laws of his country.

Judge Furches was born and nurtured on North Carolina soil. He learned to love his mother State when first from his birthplace in the Piedmont he gazed upon her blue mountains and in early manhood when he contemplated her glorious future. For forty-three years he has pursued the honorable career of a lawyer and a Judge and at the age of sixty-eight has been elevated to the highest judicial position in the gift of the people. His immediate companions in labor as a lawyer have been Armfield, Robbins, Clement, J. M. McCorkle, M. L. McCorkle, Folk, Linney, Tucker and Montgomery, all of whom have passed over the river except three, two of whom have been permitted to come here to bear testimony to his unsullied character as a citizen, lawyer, neighbor, friend.

The late Chief Justice, ripe in years and honors, but a few days before the institution of this impeachment, passed from the Supreme Court here and entered the portals of the Supreme Court above, there to hear and receive its judgment.

> They have laid him down to slumber,
> Where the toils that encumber
> Such a busy irksome life as his,
> Can never reach him more.

You are asked to disgrace and to blast the memory of the dead. You are asked to send to the sorrowing widow of the Chief Justice an epitaph to be inscribed upon the slab which shall soon mark his

new-made grave—"Guilty of high crimes and misdemeanors in office!"

I appeal to the experience and judgment of mankind to justify the assertion that no man with a lifetime of virtue and honor behind him ever suddenly and at one bound became an exceedingly wicked and corrupt one. *Nemo repente' fuit turpissimus!* Is it conceivable to any just and rational mind that men highly honored, with stainless records won during a lifetife of devotion to duty, in the twinkling of an eye were transformed into moral monsters; that all at once they were ready to sell "the mighty space of these large honors for so much trash as may be grasped thus"? It is unbelievable. It can not be true.

HOKE V. HENDERSON—THE DECISIONS APPROVING—TRIBUTE TO RUFFIN, THE AUTHOR.

The insuperable obstacle in the pathway of the Managers has been the doctrines as laid down in the case of *Hoke v. Henderson.* They could not maintain that the principles as announced in that opinion were not the law of the land, but we have heard the declaration time and again that these principles were dangerous to our institutions. The fact is, that until that opinion is overturned by legitimate authority, none of the charges in these artices can be sustained. The honorable Manager who opened the prosecution maintained that the doctrines in that opinion were dangerous, but it seems that these dangers never occurred to some of the most eminent jurists who have ever adorned our Supreme bench. This celebrated opinion was delivered by Justice Ruffin in December, 1833, and from that day until the present hour it has been the law of the land. Five separate and distinct constitutional conventions since 1833 have failed to abrogate or modify the principles of that opinion, or in anywise to attempt to do it, and no Legislature since that day has enacted a law in contravention of its principles, although it was suggested by the Supreme Court in the case of *Wilson v. Caldwell* that the Legislature might do so, provided the act went into effect prospectively.

Although the Supreme Court has never adverted to the fact in any of these office-holding cases, it is nevertheless true that the people of the State in Convention have recognized and approved the doctrine of *Hoke v. Henderson.* The Convention of 1875, which had in it some of the ablest lawyers and representatives in the State, incorporated into the provisions of that Constitution, as set forth in Article V., section 33, the following words: "The amendments made to the Constitution of North Carolina by this Convention shall not have the effect to vacate any office or term of office now existing under the Constitution of the State, and filled, or held, by virtue

of any election or appointment under the said Constitution, and the laws of the State made in pursuance thereof." Again, the people of the State through their representatives, when they enacted the Code of 1883, recognized, ratified and approved this doctrine now thought to be so dangerous, when they solemnly incorporated into the new Code, as contained in section 3872, the following words: "All persons who shall hold any office under any of the acts hereby repealed, shall continue to hold the same according to the tenure thereof." It is singular that it escaped the attention of the many learned lawyers who argued the office-holding cases, and of the Judges who decided the cases, that the doctrine of *Hoke v. Henderson* had thus received the sanction and repeated approbation of the people in sovereign convention and in The Code, which had been carefully revised by a commission of learned lawyers and afterwards approved by the Legislature.

It is interesting to observe that long before these respondents were called to their high positions that the principles in *Hoke v. Henderson* had been approved in twenty-five different opinions of the Supreme Court, and that the Judges who have either written the opinions, or concurred therein, include the ablest men who ever sat upon that bench, and these are, Ruffin, who wrote the opinion, and Daniel, Gaston, Pearson, Nash, Battle, Manly, Reade, Rodman, Dick, Boyden, Bynum, Faircloth, Smith, Davis, Merrimon, Shepherd, Clark, Avery and MacRae. Briefly stated, the doctrine as laid down in *Hoke v. Henderson* is, that an officer has an estate in his office—the Legislature has the power to destroy the office and by consequence the estate in the office—but if it passes an act apparently having this purpose, but which continues the office and undertakes to transfer the estate in the office to another person, such act is unconstitutional and void—it amounts to the Legislature pronouncing a judicial sentence of forfeiture—of violating the bill of rights which says "That no freeman ought to be taken, imprisoned, or disseized of his freeholds, liberties or privileges, or outlawed, or exiled, or in any manner destroyed or deprived of his life, liberty or property, but by the law of the land"—that such an act by the Legislature is an usurpation of judicial functions in violation of that section of the Constitution which declares that the legislative, executive and supreme judicial powers of the government ought to be forever separate and distinct from each other.

The doctrine, therefore, of *Hoke v. Henderson* stands out before us as one of the judicial landmarks of the century.

As a part of my argument, I refer to the twenty-five opinions, the points decided, and the Judges who heard the cases, in an exhibit filed at the close of my argument.

It may not be out of place to pause a moment in tribute to the

memory of the author of the opinion in *Hoke v. Henderson.* In doing so we are met at the threshhold with the words of Gov. William A. Graham, who in his day was an oracle among us, and whose fame and statesmanship are the pride of all North Carolinians, and who himself belonged to a different political party from that of the Chief Justice. In his address upon the life of Ruffin, Governor Graham says: "The opinion of *Hoke v. Henderson* received the highest encomiums of Kent and other authors on constitutional law, and it was the main authority relied on by Reverdy Johnson in *ex parte* Garland, which involved the power of Congress by test oath to exclude lawyers from the practice in the Supreme Court of the United States for having participated in the Civil War."

Long after the Chief Justice had retired from the bench to spend the evening of his days in the bosom of his family, it was my fortune in my youth to have seen him. He was the near neighbor of my maternal grandfather, from whose home I have often gazed upon his unpretentious residence upon the banks of the historic Alamance, not far away from the scene of the first Revolutionary struggle. Around the family fireside I was then taught to reverence him, and I now revere his memory. He was a farmer, lawyer, patriot, jurist. His life was simple in its sublimity, and sublime in its simplicity. Truly may it be said of him that he was

> "A man resolved and steady to his trust.
> Inflexible to ill and obstinately just."

When I visit the Supreme Court room of my State, I see hanging upon its walls the portraits of the departed Judges as they are revealed by the painter. The picture of Ruffin in life-size is larger than the others. Without intending invidious comparison, if I may be pardoned to indulge the impressions of childhood, I will say that it is well. It has been said that the eloquence of Demosthenes was like a rapid torrent; that of Cicero like "a rapid large stream that glides smoothly along with majestic tranquility." As I gaze upon these paintings of the Judges and of the Chief Justice, I involuntarily think of a great central luminary with a splendid constellation of shining orbs around it. When I reflect upon the high place he attained amongst the jurists of this country, I am reminded of the simile of Goldsmith when he pays the highest tribute that ever was paid to the village preacher:

> "As some tall cliff with awful form,
> Swells from the vale, and midway leaves the storm,
> Though round its breast the rolling clouds are spread,
> Eternal sunshine settles on its head."

May we not use the simile and say that Ruffin rises like Mount Mitchell, piercing the sky, whilst Merrimon, Smith, Pearson and

many others of his great companions rise heavenward in stately grandeur around him!

Is it to be wondered at that these respondents followed in the footsteps of Ruffin?

JUDICIAL USURPATIONS.

The learned counsel for the Managers array the strictures of Jefferson upon the Courts in disparagement of the great opinion of Marshall in *Marbury v. Madison*, in which it was decided that the Court can compel an executive officer to perform a ministerial act—a principle now universally accepted in all the State and Federal Courts. When Jefferson made his criticism and gave his warnings, the Government was in its infancy; the Constitution had but recently been written, and had at that time received but few judicial interpretations; his views are colored somewhat by the sympathies of a great political leader, whose lines of thought had enlisted him on the side of the executive and legislative departments, rather than the judicial department of the Government. Under the ægis of Jefferson, my friends paint, in lurid colors, the aggressions of the Federal judiciary, of our Supreme Court, and the evils of judg-made law.

If Jefferson himself could now behold the Government as it is—State and Federal—the powers exercised by the different departments of the Federal Government especially—he would find the Chief Executive clothed with almost unlimited authority—with the lives and destiny of over ten millions of people in foreign lands in his hands and dwelling outside the pale of the Constitution—with an army and navy of nearly one hundred thousand men subject to his orders—the Speaker of the lower House of Congress practically the ruler of that body and exercising autocratic power—the destiny of the general government thus practically in the hands of the President, the Speaker of the House of Representatives, and the Senate. As between the departments of the Federal Government there is but one great conserving force, and that is the Supreme Court of the United States. It is still a great Court. It is still conservative. It is still composed of men of great ability and wisdom. To it we must chiefly look for the preservation of our liberties.

If there have been usurpations of jurisdiction by judges, it has been in those unfortunate instances which have been too frequent when the clash arose between the State and Federal Courts, and when at times great wrongs have been done in the name of justice. It has been seldom, indeed, when any State Court has ever been accused by the people of the State with the usurpation of judicial power. And when Jefferson spoke of judicial usurpation, when

he refused to obey the subpœna to appear in person before the Court when President, in the Burr trial, when he urged the impeachment of Chase for political speeches to the grand jury, and the impeachment of Pickering for failing to protect the rights of the Government—in all these instances—his animadversions were directed against the Federal Judges and Courts, and not those of the States.

The Federal Judges are appointed by the President, hold their positions for life, are paid large salaries, and are almost entirely independent of the people. The Judges of the Courts of our States are elected by the people, hold but limited terms, and are paid small salaries. I am firmly convinced, and make bold to speak out my conviction, that something ought to be done in North Carolina to give greater independence to the judiciary. The position of Judge in this State ought to be the highest prize in the reach of the wisest and the best lawyers in North Carolina. But if everything is true which has been urged by the attorneys for the prosecution with respect to the usurpation of judicial power by the Federal Courts, I respectfully submit that these respondents should not be and can not be held responsible for the conduct of the Federal Judges, and I respectfully submit also that these respondents during their term of office, and their associates, have maintained the dignity and sustained the jurisdiction of our Supreme Court to the extent of their powers against every encroachment or invasion of its powers by any other Court.

THE BOUNDARY LINES BETWEEN THE DEPARTMENTS OF GOVERNMENT.

My learned friend, Major Guthrie, has made an exhaustive argument to define the boundary line which separates the three different departments of the govrnment. I have admired the confidence with which he approached the settlement of this great question. For myself, I confess that I approach it with misgivings and hesitate to rely upon my own judgment. When I search for light, I am still left in doubt. One of the greatest lawyers of the past century said that the question had never been satisfactorily settled in his mind. We all know that it is a question that has engaged the minds of philosophers, publicists, constitutional lawyers and statesmen ever since the Constitution was written, and who yet has been able to define with absolute certainty where the judicial, the legislative and the executive power begins and ends? It is yet a question, says Wm. M. Evarts, "as to whether it is in the power of a written constitution to draw lines of separation, and put up buttresses of defense between the co-ordinate branches of the government. And with this question settled adversely, with the determination that the legislative branch can devour, and having the power, will devour, the other branches of the Government, thus the balances of the Constitution are lost, and lost forever."

On this subject, I beg to quote from that great constitutional lawyer and statesman, Daniel Webster, from his works, volume 4, page 122:

"The first object of a free people is the preservation of their liberty, and liberty is only to be preserved by maintaining constitutional restraints and just division of political power. Nothing is more deceptive or more dangerous than the pretense of a desire to simplify government. The simplest governments are despotisms; the next simplest, limited monarchies; but all republics, all governments of law, must impose numerous limitations and qualifications of authority, and give many positive and many qualified rights. In other words, they must be subject to rule and regulation. This is the very essence of free political institutions. The spirit of liberty is, indeed, a bold and fearless spirit; but it is also a sharp-sighted spirit; it is a cautious, sagacious, discriminating, far-seeing intelligence; it is jealous of encroachment, jealous of power, jealous of man. It demands checks; it seeks for guards; it insists on securities; it intrenches itself behind strong defences and fortifies itself, with all possible care, against the assaults of ambition and passion. It does not trust the amiable weakness of human nature, and, therefore, it will not permit power to overstep its prescribed limits, though benevolence, good intent, and patriotic purpose come along with it. Neither does it satisfy itself with flashy and temporary resistance to illegal authority. Far otherwise. It seeks for duration and permanence; it looks before and after; and, building on the experience of ages which are past, it labors diligently for the benefit of ages which are to come. This is the nature of constitutional liberty; and this is *our* liberty; if we will rightly understand and preserve it. Every free government is necessarily complicated, because all such governments establish restraints, as well on the power of government itself as on that of individuals. If we will abolish the distinction of branches, and have but one branch; if we will abolish jury trials, and leave all to the judge; if we will then ordain that the legislator shall himself be that judge; and if we will place the executive power in the same hands, we may really simplify government. We may easily bring it to the simplest of all possible forms, a pure despotism. But a separation of departments, so far as practicable, and the preservation of lines of division between them, is the fundamental idea in the creation of all our constitutions; and, doubtless, the continuance of regulated liberty depends on maintaining these boundaries."

Again, I have gone to the fountains and found that Judge Cooley, in his work on Constitutional Limitations, 6th Ed., pages 112 and 113, says: "But the legislative action can not be made to retroact upon past controvercies and to reverse decisions which the Courts,

in the exercise of their undoubted authority, have made; for this would not only be the exercise of judicial power, but it would be its exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review to which parties might appeal when dissatisfied with the rulings of the Courts. As the Legislature can not set aside the construction of the law already applied by the Courts to actual cases, neither can it compel the Courts for the future to adopt a particular construction of a law which the Legislature permits to remain in force. To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative." Again, he says on page 68: "The general acceptance of judicial decisions as authoritative by each and all can alone prevent confusion, doubt and uncertainty, and any other course is incompatible with a true government of law."

THE POWER TO DECLARE ACTS UNCONSTITUTIONAL—THE NUMBER AND INSTANCES.

But it is said that the Court has been reckless in declaring acts of the Legislature unconstitutional. I believe I heard no cases cited, however, except these office-holding cases. If the Senate can take the time to investigate the question, it will find that every Judge who has ever sat upon the bench in this State has either written or concurred in an opinion of the Court declaring the acts of the Legislature unconstitutional, except Judge Toomer, who was upon the bench for about a month, and Judge Turner, who was on the bench only from June to December, and the younger Ruffin, who was on the bench only from 1881 to 1883. And these opinions were rendered from time to time, beginning with *Jones v. Crittenden*, in the 1st N. C., 385, down to and including the 113th N. C. It will be found that these different Judges who wrote or concurred in opinions declaring acts of the Legislature unconstitutional, are as follows: Judge Ashe, five times; Judge Avery, five times; Judge Battle, six times; Judge Boyden, five times; Judge Burwell, once; Judge Bynum, six times; Judge Clark, six times; Judge Davis, six times; Judge Dick, four times; Judge Dillard, twice; Judge Daniel, twice; Judge Faircloth, while Associate Justice, once; Judge Hall, once; Judge Henderson, once; Judge Manly, three times; Judge Merrimon, eight times; Judge MacRae, twice; Judge Nash, three times; Judge Pearson twenty times; Judge Reade, twelve times; Judge Rodman, twelve times; Judge Ruffin, three times; Judge Settle, seven times; Judge Shepherd, six times; Judge Smith, seven times; Judge Taylor, once; Judge Gaston, twice. I do not know whether these great Judges were right or not in all of their decisions invalidating acts of the Legis-

lature; it may be that they were sometimes wrong; but it is far from my thoughts, and it seems to me it should be far from the thought of anyone, to imagine that they committed an impeachable offense by declaring an act of the Legislature unconstitutional. Right or wrong, I have no doubt as to their good faith and honest intentions.

I append to my argument a brief of the cases, giving the statute annulled and the names of the Judges in each case.

THE SUPREME COURT.

How much more agreeable is it to contemplate the virtues of eminent men who have been elevated to the Supreme bench than to animadvert upon their faults! From the organization of this high Court until the present hour, thirty-four citizens of the State have been honored to seats in its counsels, nine as Chief Justices and twenty-five as Associate Justices. It was permitted some to pursue their labors there longer than others, some to achieve higher distinction and to make greater reputation than others. "As one star differeth from another star in glory," so some of these have shone with steadier light and greater effulgence; but the candid judgment of mankind will yet justify the assertion that all of them have shed some light in the realm of judicial thought. In the great body of our law recorded in their opinions, they have laid the foundation broad and deep of our judicial literature, which shall be an inheritance of inestimable value to us and to all the generations that yet may come. What they received from the past, what their learning, wisdom and unselfish labors enabled them to unfold and reflect from their present, may not have been—indeed, could not be—as perfect as if it had come from the directing mind of the Omniscient, but it is just and reasonable to believe that what they have given us was transmitted faithfully and with that measure of wisdom with which the Father endowed them. These opinions are the result of the toil of these wise men for nearly a century. The vast majority of the thirty-four have passed from the Court below to the Court above. It is mine to believe, and I am glad to believe, that not one of them, living or dead, was ever guilty of an official act whilst on the bench that savored of corruption or that tarnished the ermine he wore. After nearly a century, is it possible that we shall now invade the precincts of that high tribunal and strike down two of its honored members for supposed errors of judgment? Shades of Merrimon, Smith, Pearson, Battle, Ashe, and all the other worthies, spare us the humiliation!

Conclusion.

Senators, my task, imperfectly performed, is near its close. The greater one remains with you. When you have reviewed the whole case, all the opinions of the respondents involved, and determined what the law is, or should have been, the duty devolves upon you to delve deeper until you find the motive, and an evil motive, for you will never convict anyone in whose mind there was no evil purpose. You have not been detained here with these high duties that your minds might be turned away from truth by the passions of the hour, that you might "harden your hearts" and turn away your eyes and "not look at heaven to do the purposes of unjust judgment." When you consider that the evidence in this case is utterly insufficient to establish a trivial claim upon the civil side of the docket, and totally inadequate to convict one charged with an assault and battery, is it not monstrous to be allowed to ruin human honor? Your judgment will go forth to the world, not as the judgment of the General Assembly, but as your judgment as a court. If these respondents are convicted, it may not reach its objects, but may rebound upon those who deliver it. This the future only can reveal. It is true no organized tribunal on earth can review it, but the people of the State and of other States and future generations will review it and pass judgment upon it. Are you willing on such evidence as this to send the news to our sister States that a majority of our Supreme Court, after hearing thirty-nine office-holding cases, involving judgeships, solicitorships, Railroad Commissioners, control of the asylums, control of the schools, and after deciding a majority of the cases favorably to the party opposed to them in politics, suddenly became biased, corrupted, and rendered a corrupt judgment, granting White, the fisherman, his salary of four hundred dollars a year? Do the Judges when corrupted thus haul seines for minnows?

The Managers and their counsel demand the conviction of these respondents. Before you render that verdict, if you do it, in the name of justice, I demand that you do it because the facts and the law justify it. In the name of liberty, I demand that the innocent shall not be stricken in the temple of justice. *Si innocens damnatur, judex bis damnatur*—twice condemned is the Judge if the innocent is condemned! I understand that it was vehemently demanded in the House of Representatives that the judicial robes should be torn from these respondents, and that they should be pulled down from the high seats which they had dishonored. Beware of pulling down, lest we do like Sampson—destroy the temple indeed, but in that self-same moment crush the supreme judicial tribunal of the State and ourselves beneath the ruins! The stability and perpetuity of our liberties and civilization, aye, the life of the State itself, are

inseparably connected with and dependent upon an independent judiciary—a judiciary unawed by the vicissitudes of political parties—unmoved by the expedients which often follow political revolutions—unenthralled by allegiance to party—uninfluenced by the passion for innovation and instability so common in republican governments—untrammeled by unjust restraints—unhindered by slavish dependence upon the legislative or executive departments of government.

It is true that all men are fallible, that all human laws are imperfect, that all human courts have erred. It is only the "law of the Lord" that "is perfect." It is only "the judgments of the Lord that are true and righteous altogether." Once establish a precedent that Judges are to be impeached and can be impeached for mistakes, or for expediency, or for any cause except for impeachable offenses recognized by the laws, and we will have a judiciary of subservient and truculant cowards, whose opinions will be moulded in harmony with the dominant political sentiment of the hour.

Senators, you hold in the balance a mighty issue!

> "Poise the cause in justice's equal scales
> Whose beam stands sure, whose rightful cause prevails."

If truth triumphs, none can complain; if error, it will plague us through many a winding way and lingering year.

I.

Supplemental Authorities and References Sustaining Argument. Hoke v. Henderson.

The twenty-five cases decided before these respondents went on the bench, and which cited and relied on *Hoke v. Henderson*, and which I rely on to sustain respondents in *White v. Hill*, and all the other opinions in the office-holding cases delivered or concurred in by them are as follows:

(1) Taylor v. Stanley, 15—31. (Decided 1833.)

This was an action to try title to office and practically same principles involved as in Hoke v. Henderson. Decided at same term.
Opinion by Ruffin, C. J. Concurring, Daniel and Gaston.

(2) Railroad Co. v. Davis, 19—451. (Decided 1837.)

Condemnation of land. Hoke v. Henderson distinguished. This case involved taking property for public use.
Opinion by Ruffin, C. J. Concurring, Daniel and Gaston.

(3) Houston v. Bogle, 32—496. (Decided 1849.)

Gifts in fraud of creditors. A legislative act can not deprive one person of a right and vest it in another.
Opinion by Pearson. Concurring, Ruffin and Nash.

(4) Green v. Cole, 35—426. (Decided 1852.)

Execution sale. The Legislature can not interfere with vested rights of property.
Opinion by Ruffin, C. J. Concurring, Nash and Pearson.

(5) State v. Moss, 47—66. (Decided 1854.)

Indictment, assault and battery. Legislative act should be declared unconstitutional only when no doubt exists.

Opinion by Nash, C. J. Concurring, Pearson and Battle.

(6) Thompson v. Floyd, 47—313. (Decided 1854.)

Devisavit vel non. Legislature may act in all things unless restrained by Constitution.

Opinion by Battle. Concurring, Nash and Pearson.

(7) State v. Glenn, 52—321. (Decided 1859.)

Indictment for obstructing river. The State can not take property away from an individual or impair its value but for a public use.

Opinion by Battle. Concurring, Pearson and Ruffin.

(8) Cotten v. Ellis, 52—545. (Decided 1859.)

Mandamus for officer's salary. Officer has vested right in office.

Opinion by Pearson. Concurring, Battle and Manly.

(9) Barnes v. Barnes, 53—372. (Decided 1861.)

Action of debt. The Legislature can not deprive a citizen of his vested rights of property. ("Stay Laws.")

Opinion by Pearson. Concurring, Battle and Manly.

(10) Gatlin v. Walton, 60—333. (Decided 1864.)

Habeas corpus. Office may be abolished when public good requires it.

Opinion by Battle. Concurring, Manly. Pearson dissents from conclusion.

(11) State v. Smith, 65—369. (Decided 1871.)

Assault and battery. Cotten v. Ellis quoted in part, including its citation of Hoke v. Henderson.

Opinion by Pearson. Concurring, Rodman, Reade, Dick and Boyden.

(12) King v. Hunter, 65—603. (Decided 1871.)

Action to try title to office. "We need hardly refer to the familiar cases of Hoke v. Henderson and Cotten v. Ellis in our own reports."

Opinion by Reade. Concurring, Pearson, Rodman, Dick and Boyden.

(13) Clark v. Stanley, 66—59. (Decided 1872.)

Action to try title to office. "We need only refer to Hoke v. Henderson, 4 Dev., 1, that mine from which so much rich ore has been dug" (discussing title to office).

Opinion by Pearson. Concurring, Reade, Rodman, Dick and Boyden.

(14) Brown v. Turner, 70—93. (Decided 1874.)

Mandamus involving title to office. The abolition of an office which disturbs no vested right or term of an incumbent is constitutional.

Opinion by Bynum. Concurring, Pearson and Rodman. Settle and Reade dissent from conclusion.

(15) Bunting v. Gales, 77—284. (Decided 1877.)

Action to try title to office. After a law has once fixed the tenure of an office a subsequent act of the Legislature can not alter the tenure to the detriment of persons then in office.

Opinion by Rodman. Concurring, Pearson, Reade, Bynum and Faircloth.

(16) Vann v. Pipkin, 77—408. (Decided 1877.)

Suit on Sheriff's bond. "The Sheriff has a property in the emoluments of his office of which he can not be deprived but by the law of the land."

Opinion by Bynum. Concurring, Pearson, Reade, Rodman and Faircloth.

(17) Prairie v. Worth, 78—169. (Decided 1878.)

Injunction by sureties on Sheriff's bond against execution against them. The Legislature has the power to control an office as the public good may require.

Opinion by Bynum. Concurring, Smith, Reade, Rodman and Faircloth.

(18) Lyon v. Akin, 78—258. (Decided 1878.)

Action to recover possession of land. Vested rights (discussing "Stay Law").

Opinion by Bynum. Concurring, Smith, Reade, Rodman and Faircloth.

(19) Rea v. Hampton, 101—51. (Decided 1888.)

Injunction to restrain action under Code, 3383. Constitutionality of act regulating fishing in certain waters. "They (Hoke v. Henderson and Vann v. Pipkin) only decide that a person holding an office has a property in his office of which he can not be deprived while the office remains without violating the Constitution; it is property of which he can not be deprived but by the law of the land."

Opinion by Davis. Concurring, Smith and Merrimon.

(20) McNamee v. Alexander, 109—242. (Decided 1891.)

Action to declare State grants void. Legislature can not transfer property from one person to another for private uses.

Opinion by Avery. Concurring, Merrimon, Davis, Shepherd and Clark.

(21) State v. Cutshall, 110—538. (Decided 1892.)

Indictment for bigamy. Quotation at some length from Hoke v. Henderson to effect that laws punishing persons or depriving them of property without due process of law are void.

Opinion by Avery. Concurring, Clark and Davis. Shepherd concurs in result. Merrimon dissents.

(22) Lowe v. Harris, 112—472. (Decided 1893.)

Action to recover land. "No law which divests property out of one person and vests it in another for his own private purposes without the consent of the owner has ever been held a constitutional exercise of legislative powers in any State of the Union.

Opinion by Avery. Concurring, Shepherd and MacRae. Burwell and Clark dissents.

(23) Board of Education v. Kenan, 112—566. (Decided 1893.)

Controversy without action. Money demand on Sheriff for school funds. "What is called in Hoke v. Henderson, 4 Dev., 1, the gravest duty of a Judge, a decision upon the constitutionality of an act of the General Assembly."

Opinion by MacRae. Concurring, Shepherd, Avery, Clark and Burwell.

(24) State v. Womble, 112—862. (Decided 1893.)

Indictment for failure to work roads. Unless the law itself declares intent with which it was passed, Courts must assume that Legislature had lawful motive.

Opinion by Avery. Concurring, Shepherd, McRae and Burwell. Clark dissents.

(25) Trotter v. Mitchell, 115—190. (Decided 1894.)

Action to try title to office. "The relator's office of Public Administrator was a property right, and it is well settled that he can not be deprived thereof, but by the law of the land.

Per Curiam.—Shepherd, Avery, Clark, MacRae, Burwell.

II

Sustaining Argument—Decisions Declaring Acts Unconstitutional.

Decisions of the Supreme Court from 1814 to 1894, before respondents became Justices of the Supreme Court, declaring unconstitutional, null and void acts of the Legislature with the names of the Judges writing and concurring in the opinions and dissenting therefrom:

(1) Jones v. Crittenden, 1—385.

Act 1812, "Suspension Act," is unconstitutional.

Opinion by Taylor, C. J. Concurring, Henderson, Hall and Seawell.

(2) Robinson v. Barfield, 6—391.

Act of Legislature validating former void acknowledgments is void.

Opinion by Seawell and Daniel.

(3) Taylor v. Stanley, 15—31.

Same as Hoke v. Henderson.

Opinion by Ruffin. Concurring, Daniel and Gaston.

(4) Hoke v. Henderson, 15—1.

Laws of 1832, chapter 2, which continues an office, but transfers it to another officer, is unconstitutional and void.

Opinion by Ruffin. Concurring, Daniel and Gaston.

(5) Bank of State v. Bank of Cape Fear, 35—75.

Act of 1850, in regard to exchange of bank notes is unconstitutional.

Opinion by Ruffin, C. J. Concurring, Nash and Pearson.

(6) State v. Moss, 47—66.

An act giving intendant of police of town the power to try assault and battery is unconstitutional.

Opinion by Nash, C. J. Concurring, Pearson and Battle.

(7) Stanmire v. Taylor, 48—207.

Act passed in 1852 (Private) impairs obligation of contract, and is, therefore, unconstitutional, transferring property impairing obligations of contract.

Opinion by Nash, C. J. Concurring, Pearson and Battle.

(8) State v. Glenn, 52—321.

Chapter 244, Acts 1858, in regard to obstructing creeks, etc., interferes with vested rights, and is, therefore, unconstitutional.

Opinion by Battle. Concurring, Pearson, C. J., and Manly.

(9) Cornelius v. Glenn, 52—512.

Action for penalty governed by above case.

Opinion by Pearson, C. J. Concurring, Battle and Manly.

(10) Barnes v. Barnes, 53—366.

"Stay Laws" unconstitutional.

Opinion by Pearson. Concurring, Battle and Manly.

(11) Attorney-General v. Bank of Charlotte, 57—287.

Revenue Act of 1856, chap. 34, sec. 133, imposing certain tax on banks, is void as impairing contract rights.

Opinion by Battle. Concurring, Pearson, C. J., and Ruffin.

(12) Galloway v. Jenkins, *et al.*, 63—147.

Act of 18 December, 1868, in regard to State subscribing for stock in railroad and issuing bonds for payment is unconstitutional.

Opinion by Pearson, C. J. Concurring, Rodman and Dick. Dissenting, Reade and Settle.

(13) R. R. v. Holden, *et al.*, 63—410.

Act of January 30th and April 1st, '69, in regard to University R. R. Co., is invalid.

Opinion by Pearson, C. J. Concurring, Reade, Dick, Settle and Rodman.

(14) Clark v. Stanley, 66—59.

The act of the Legislature giving to President of Senate and Speaker of House power to appoint State proxies and directors is against section 10, Art. III, of the Constitution, and, therefore, void.

Opinion by Pearson, C. J. Concurring, Reade, Rodman, Dick and Boyden.

(15) Sutton v. Askew, 66—172.

Same as preceding.

Opinion by Reade. Concurring, Pearson, C. J., Boyden. Dick and Rodman dissenting.

(16) Wessen *et la.* v. Johnson *et al.*, 66—189.

The statutes restoring common law dower to married women are unconstitutional, so far as they apply to marriage contracted before their passage.

Opinion by Dick. Concurring, Pearson, C. J., Reade, Rodman and Boyden.

(17) Sinclair *et al.* v. State, 69—47.

Act of 1868-'69, and chapter 108, sec. 32, imposing tax on non-resident liquor dealer, is void.

Opinion by Settle. Concurring, Pearson, Reade, Rodman and Boyden.

(18) Fell v. Porter, 69—140.

Act of 1869-'70, chapter 169, enlarging jurisdiction of Justices of Peace, declared unconstitutional.
Opinion by Pearson, C. J. Concurring, Reade, Rodman, Settle and Boyden.

(19) R. R. Co. v. City of Wilmington, 72—73.

Section 10, chap. 5, Private Laws 1868-'69, authorizing Mayor and Aldermen of Wilmington from time to time to assess property, is unconstitutional.
Opinion by Rodman. Concurring, Pearson, C. J., Reade, Settle and Bynum.

(20) R. R. Co. v. Commissioners of Caldwell County, 72—486.

Act of 1869-'70, chapter 9, attempting to change provisions of section 7, Art. VII, of Constitution, in regard to majority of qualified voters voting bond levy, is void.
Opinion by Rodman. Concurring, Pearson, C. J., Reade, Settle and Bynum.

(21) Van Bokkelen v. Canady, 73—198.

Act of 1875 amending charter of Wilmington, in regard to qualification of voters, is void.
Opinion by Reade. Concurring, Pearson, C. J., Rodman, Settle and Bynum.

(22) Gamble v. McCrady, 75—509.

Section 9, chap. 39, Battle's Revisal, is unconstitutional.
Opinion by Rodman. Concurring, Pearson, C. J., Reade, Settle and Bynum.

(23) University v. N. C. R. R., 76—102.

Laws 1874-'75, chap. 236, in regard to payment of unclaimed dividends to University, is unconstitutional.
Opinion by Bynum. Concurring, Pearson, C. J., Reade and Rodman.

(24) Young v. Town of Henderson, 76—420.

Chapter 79, Private Laws 1868-'69, it being charter of town of Henderson, is partly unconstitutional in that it does not levy uniform taxes.
Opinion by Rodman. Concurring, Pearson, C. J., Reade, Bynum and Faircloth.

(25) Long v. Bank, 81—41.

Acts 1866, chap. 3, forcing creditors if insolvent bonds to accept *pro rata* share in assets in full of claim, is void.
Opinion by Smith, C. J. Concurring, Ashe.

(26) Albertson v. Wallace, 81—479.

Acts 1876-'77, Schedule "B," is void inasmuch as it makes discrimination in favor of purchases from dealers within the State.
Opinion by Smith, C. J. Concurring, Ashe and Dillard.

(27) Washington Toll Bridge Co. v. Commissioners of Beaufort, 81—491.

Act of December 11, 1866, conferring on ferry certain exclusive rights, is void as a monopoly.
Opinion by Smith, C. J. Concurring, Ashe and Dillard.

(28) Puitt *et al.* v. Commissioners of Gaston County, 94—709.

Same principle as above.

(29) Rigsbee v. Town of Durham, 94—800.

Chapter 231, Laws 1881, in regard to public schools for Durham, is void in so far as it attempts to divide the taxes derived from whites and negroes to be applied to separate schools.

Opinion by Smith, C. J. Concurring, Ashe and Merrimon.

(30) McGwigan v. W. and W. R. R., 95—428.

Act of Legislature regulating interstate freight rates, is void.

Opinion by Smith, C. J. Concurring, Merrimon and Ashe.

(31) Markham v. Manning, 96—132.

Law directing that school tax raised from whites be applied to white schools and that raised from negroes to negro schools is void.

Opinion by Smith, C. J. Concurring, Merrimon and Davis.

(32) State v. Devine, 98—778.

Code, secs. 2327 to 2330, in regard to killing of cattle by railroads, is unconstitutional.

Opinion by Smith, C. J. Concurring, Merrimon and Davis.

(33) Greensboro v. Hodgin, 106—182.

Acts 1888-'89, sec. 78, charter of Greensboro, in regard to division of public school money between town and county, is void.

Opinion by Merrimon, C. J. Concurring, Davis, Shepherd, Avery and Clark.

(34) State v. Barker, 107—913.

Acts of 1885, chap. 63, giving nine grand jurors power to find a true bill, is unconstitutional.

Opinion by Shepherd. Concurring, Merrimon, C. J., Davis, Avery and Clark.

(35) Trustees Goldsboro Graded School v. Broadhurst, 109—228.

Act 1891, chap. 206, authorizing special tax, etc., without submission to vote, is unconstitutional.

Opinion by Merrimon, C. J. Concurring, Davis, Shepherd, Avery and Clark.

(36) State v. Cutshall, 110—538.

Code, sec. 988, in regard to bigamy, is unconstitutional.

Opinion by Avery. Concurring, Davis, Shepherd and Clark. Dissenting, Merrimon, C. J.

(37) State v. Moore, 113—697.

Acts 1891, chap. 75, taxing emigration agents in certain counties, is unconstitutional.

Opinion by Shepherd, C. J. Concurring, Avery, Clark, MacRae and Burwell.

SPEECH OF JAMES H. POU, OF COUNSEL FOR THE MANAGERS.

MR. PRESIDENT AND SENATORS:— In the development of the science of self-government it seems inevitable that conflicts must arise between the Representatives of the people and other branches of the Government. It has been so from the beginning, and it remaineth so. Heretofore these conflicts have usually been between the Legislature and the Executive; and usually these conflicts have been waged over the right, always claimed by the representatives of the people, to control the levying of taxes, and the appropriation and expenditure of the funds realized from such taxes. The representatives of the people, here and elsewhere, at all times, have realized that if they permitted the power to levy taxes, to appropriate money and to expend the public moneys to pass into hands other than their own, the liberties of the people would thereafter be held only at the sufferance of the power which could exercise these functions. It has been held in America, as well as in the Mother Country, that the liberty of the people would not long survive the loss of their control of the public Treasury. While these conflicts have heretofore been between the Legislature and the Executive, the conflicts of the future may, and probably will, be between the Legislature and the Judiciary; or between the Legislature on the one side and the Executive and the Judiciary on the other. Thoughtful men predict that no attempt upon the liberties of the American people will stand any chance of success which is not backed by the power, prestige and influence of the Judicary. Our deference for the Judiciary is such that the people are not quick to call attention to its faults or its delinquencies; nor are we apt to resist promptly insidious encroachments from that department. Our confidence in the Judiciary is such that we do not suspect its motives; nor would we believe the Judiciary capable of bad motives in the absence of cogent proof.

In the past, attacks upon the liberties of the people have assumed various forms Sometimes, as in the case of Charles the First, old precedents are revived and given a new meaning and application; and under the guise of those precedents substantial rights of the peope are invaded, and prerogatives not theretofore held are claimed by the Executive.

At other times, as during the reign of James the Second, the attack has assumed the form of a flagrant violation of law on the part

of the Executive. Of these methods of attack, manifestly the less dangerous is where the law is openly violated and defied. In such cases the people see their danger at once, and adopt the necessary means of protecting and securing their liberties. When James the Second suspended the enforcement of the law it was realized at once that English liberty was at stake, and that the king must be overthrown or that the monarchy would become absolute. The king found that, having openly defied the law, he had no hope of being sustained unless the doctrine of non-resistance, preached for a generation by Mainwaring and Filmer, should avail him. This hope failed him, and the house of Stuart have been exiles for two hundred years.

More dangerous than this was the attempt of his father, who undertook to impose "Ship money tax." Plausible arguments were adduced to show that former kings of England had likewise imposed and collected such taxes without the consent of Parliament; and the highest Court in the Kingdom upheld the contention. The tax was levied and collected by the king's order, Parliament not consenting thereto. It required a revolution and seven years of blood and carnage and a dictatorship and a second revolution to restore the equilibrium of the Constitution.

A still more dangerous form of attack upon the people's liberty is where the aggressor clothes all his acts with forms of legality; and destroys the Constitution without breaking its letter. We have an instance of this kind in 1792 in France. The revolution was half accomplished, and the forces of reaction were rising. The kings of the Continent were ready to make war upon the revolution, to restore to the kings of France their ancient absolutism. The revolution resisted and war was declarred. The king had the power of veto. He did not wish the French armies to fight, but he hoped for the speedy arrival of the Austrian and Prussian forces to aid him in overthrowing the liberties of the French. When the National Assembly passed laws providing for the National defense the king vetoed their acts; when an army was organized the king placed at its head a General whose heart was not with the people, and who would not fight. Orders were issued to the Generals to watch Paris rather than the frontiers; and orders were given to the frontier garrisons not to delay the advance of the enemy. Every act the king did, either in vetoing the laws, or in distributing the army, or in giving commands to the army, was in the exercise of powers indisputably conferred upon him by the Constitution; yet he was giving day by day the most powerful aid possible to the declared enemies of France. Longwy surrendered to the Prussians with only a show of defense, Verdun surrendered without the show of defense. The Austrians were at Thionville; the Prussians at St.

Menehould, and the road to Paris was open. At last the people realized that their enemies were not on the frontiers, nor with the Austrians and Prussians; but that their enemy was Louis the Sixteenth in the Tuilleries. They rose, and the monarchy founded by Hugh Capet crumbled into dust.

We have, Mr. President and Senators, a case before us which partakes of all the forms of attack which I have mentioned. We have a Court which has done some of the acts performed in each phase of the conflicts I have mentioned. This Court has set itself up to thwart the will of the representatives of the people, and it has endeavored to clothe its acts with the form of legality. It has presumed upon the veneration and respect our people are so wont to ascribe to the Judiciary. It has searched for an ancient precedent by which to justify its acts; it has unearthed an ancient rule of construction, and by means of the old decision, and the rule of construction, the Court has endeavored to paralyze the legislative branch of the Government, and to usurp its functions. It has assumed the power to veto acts of the Legislature, suspend acts of the Legislature, to disregard acts of the Legislature; to amend, repeal and pervert acts of the Legislature; and to appropriate money and force its payment out of the public treasury. These are the acts, Mr. President and Senators, for which the people's representatives in the popular branch of the General Assembly have impeached the respondents. The specific acts alleged against the respondents are practically admitted, and their defense rests either upon the theory that, first, the acts done were right and within the scope of the authority of the Supreme Court; or, second, that the respondents had no intention or purpose of violating the law or Constitution; or, third, that if the respondents have violated the Constitution with the intent to do so, they are not impeachable, because their action was not corrupt.

In the opening address, Judge Bynum construed the language of our statute when it says that every officer in this State shall be liable to impeachment "for corruption or other misconduct in his official capacity," to mean that, whereas, corruption was something which savored of bribery or personal dishonesty, the words "or other misconduct in their official capacity" meant offenses in the same nature as bribery or personal dishonesty. I respectfully submit that the statute can not possibly have this meaning. If it has this meaning, then the conviction of Governor Holden in 1871 was manifestly unjust; yet a voice has not been raised in a generation to contend that his impeachment was not only justified, but necessary. There have been very few impeachments in this country where either bribery or of offenses partaking in their nature of personal corruption or dishonesty were charged. The reason for this

is plain. For these offenses the ordinary courts of law furnish a complete and adequate remedy, and resort is had to them. They can award punishments which will protect the public and deter the evil in a simpler and more regular manner than the Court of Impeachment. Courts of Impeachment, the text-writers tell us, are of a political nature, and their purpose is to relieve the people from unfaithful officers whose unfaithfulness constitutes a source of public danger. This public danger is present when a man who is personally honest, and who would not touch a dollar of the public funds, is guilty of a violation of his oath of office or his duty to the State. Therefore, the jurisdiction of a Court of Impeachment has never been, nor ever can be, limited to the punishment of public officers whose misconduct savors of personal corruption. In fact, the punishment of such factors is not the primary or principal province of the Court of Impeachment. Its province has ever been in the nature of an inquest of office, to scrutinize the conduct of public officers, and if they have been unfaithful in any respect, and if the public needs require it, remove them from office. All of the authorities tell us that if public officers do acts which are subversive of the Constitution of their country they are impeachable.

The House of Representatives, in the fifth of the articles of impeachment, has charged the respondents, in effect, with an attempt to usurp and exercise functions which, by the Constitution, belong to the General Assembly, and to deny to the Legislature its rightful authority. If the House of Representatives can make good these charges, then, no matter how honest may be these Judges in private life, or how scrupulous their sense of personal honesty may be, if they have done the acts charged, they are impeachable. If the House of Representatives has proven these acts, it becomes the duty of this Court to convict and pronounce judgment

Let us see now, Mr. President and Senators, whether the respondents in their Judicial capacity have encroached upon the province of the General Assembly, and have exceeded their own proper jurisdiction. All the acts charged against the respondents are alleged to have been committed since the adjournment of the Legislature, in March, 1899. That General Assembly met after an election which marked a political revolution in this State.

After dwelling for four years in the land of the Gadarines, feeding upon husks, herding with swine and possessed of devils, our State once more stood before the galaxy of the Union clothed and in her right mind. The General Assembly of 1899 were men chosen by the State and charged with the duty of rebuilding her waste places, restoring good government and re-establishing her fair name. Never were men charged with more pressing duties, and never were those duties more faithfully discharged. Let us glance at their work.

They found the Penitentiary utterly broken down. A thousand convicts were in the camps, poorly clad, some with frozen hands and feet; no order, no discipline, no decency, no cleanliness; convicts filthy, neglected, covered with vermin; the institution bankrupt, plastered over with debts, reeking with scandals and all manner of moral filth. A thousand convicts starved and neglected, guarded and controlled by criminals. This was the condition of the North Carolina Penitentiary when the Legislature of 1899 met. I do not mean to say that Captain Day was responsible for this condition. He was not. He had taken charge of the Pentientiary only a few days before the Legislature met. He was not responsible for the condition, but with a bankrupt Penitentiary and a discredited institution, he was powerless to remedy the evil.

One of the first things the Legislature did when it came here was to rehabilitate the Penitentiary. They desired to get rid of a system which had brought shame upon the State. They said, "We will not continue the one-man system. It has proven a failure. We will govern the Penitentiary as it had been governed in the past, by a Board. We will pay off the debts of the Penitentiary and we will provide that it shall not get in debt in the future. We will create an Executive Board of three, and no money shall be drawn except upon the order of this Board." It issued over $100,000 of bonds to pay debts contracted within two years.

Other departments of the State government were in but little better fix. The State retained control of only one great property: The Atlantic and North Carolina Railroad. The Legislature found it broken down, bridges and superstructures rotten, the engines wheezing along the road like asthmatics. They had seen a President of the road driven by scandal from his office; and they decided that the control of this road should be changed. They created a Board of Internal Improvements, with one member from each Congressional District, and made them responsible for the well-being of the road and charged them with the duty of rehabilitating this piece of railroad.

The Legislature found the Railroad Commission likewise discredited. The Courts had been filled with litigation to decide who were the members of the Railroad Commission. For a time the office of the Railroad Commission had to be guarded like a prison fort by armed men, and the contest for the possession of the office was carried to the Supreme Court of the United States. They said, "This system has failed. The Railroad Commission has not accomplished the purpose for which it was created. Let us wipe it out and create a new system, which will be free from the dangers and mistakes of the old. We will create a Corporation Commission and give it larger powers; we will make it responsible to the people and

the people shall select the Corporation Commissioners. We will take from the Governor the power of suspending the Commissioners and leave them responsible to the people alone. We will change the name, the manner of election, the pay and the duties. We will abolish the old system by a plain, explicit and direct statute, and then we will create a new system on a different basis altogether."

They found the oyster industry in the East likewise paralyzed. They found Admiral White, in the flagship *Lilly*, sailing over the sounds of Eastern North Carolina, a spectacle for all the world to laugh at. The great industry in those sounds, potential of untold wealth, was utterly neglected. Pirates from Virginia and Maryland plied their trade without let or hindrance, while the Admiral on his flagship, like Blackbeard of old, sailed from Edenton to New Bern and Washington and back again. I am told that the only time the Admiral desisted from his sailings was in the spring of 1898, before the Spanish fleet was destroyed at Santiago. It is rumored that he tried to dry-dock the *Lilly* in Tar River, somewhere above Greenville. After the battle of Santiago, the *Lilly* came forth again and the Admiral continued to sail the sounds of Eastern North Carolina.

The General Assembly of 1899 determined to stop all this foolishness. It realized that out of the shell-fish industry of Eastern North Carolina untold wealth might come. They found that, with proper attention, the Albemarle and Pamlico Sounds would become to North Carolina a source of wealth like the Chesapeake Bay has become to Virginia and Maryland, and it determined to foster and protect that industry. It said, "We will abolish Admiral White and his opera bouffe performances. We will not have a Chief Inspector to sail all over the sounds and to do nothing, but we will put the responsibility of protecting this industry upon the people of each county interested. There are seven shell-fish counties, and we will appoint a Commissioner for each one of these counties. We will require him to give a bond for the faithful performance of his duties. We will require him to send the money collected from the taxes every month, and we will hold him to a rigid accountability for the duties." The old system had failed, had become a burlesque and a nuisance. The General Assembly determined to abolish the old system and to create an entirely new system. Instead of confining their duties to a production of the oyster, it determined to protect every species of edible crustaceans.

I will not go through every branch of the State government. I have not the time. I have mentioned these four branches to show the necessity of a change and to show how imperative was the duty that devolved upon the Legislature of 1899. That Legislature attempted to perform this duty. It passed the laws demanded of the

people and required by existing conditions. They not only reformed the various departments of the State government, but, in obedience to the will of the people, they provided that such scandals should never again take place. They endeavored to provide for the permanent welfare of the State. All these enactments were relative to subjects over which the General Assembly admittedly had full control. There was no limitation in the Constitution upon the power of the Legislature to regulate these matters. Everyone supposed that it was not only the prerogative but the duty of the General Assembly to reorganize these departments.

Now, prior to the meeting of the General Assembly of 1899, the Supreme Court and the Legislature had been in political harmony. After the meeting of this General Assembly, they were not in harmony. Now let us see how the Supreme Court acted towards the work of that Legislature. Having done this work, the General Assembly of 1899 adjourned during the month of March. Shortly thereafter there became manifest through decisions of a majority of the Supreme Court, which majority included these respondents, a purpose to restrict the powers of the Legislature into narrower limits than had heretofore been known. Soon this tendency developed into an apparently settled purpose to nullify much of the most important legislation effected by that Legislature. Act after act was made to be of non-effect, and act after act was perverted as the General Assembly had dreamed not of. Here were subjects of legislation, admittedly within the province of the General Assembly, and about which there was no constitutional inhibition upon the General Assembly, and upon which the Legislature had expressed its intention in unmistakable terms, and in the manner prescribed in the Constitution; but the hand of the Court paralyzed the work of the Legislature, and it fell to the ground a vain and useless thing. What means did the Court adopt to effect this purpose? It adopted two methods, and by the use of these two methods in combination, it has in two years built up in North Carolina a strange and grotesque system of jurisprudence, the like of which is not to be found upon the face of the earth. The Court has taken what is commonly known as the doctrine of Hoke against Henderson, and the doctrine of *in pari materia* and made of them judicial idols. No Eastern Magus ever bowed before the sun-god more earnest devotion than does the majority of the Supreme Court, includng these respondents, bow down before these two fetishes. They have exalted these two doctrines to such an extent that the jurists who first promulgated them could not recognize them. They have combined them and made of them a very Frankenstein, uncontrolled and uncontrollable in the domain of legal construction, and ready to destroy any distasteful legislation. Let us see what these doc-

trines are! In 1833 the Supreme Court rendered the decision in Hoke against Henderson, and held that a public office was, to a limited extent, the property of the person holding the office; and that while the office remained it could not be transferred from one person, during the term of office, to another person. This, briefly stated, is the doctrine of Hoke against Henderson, now so famous. The decision expressly states that the Legislature has full power to abolish an office, to lessen or increase its emoluments or to change its duties whenever the public interest requires. It expressly holds that the right of the officer is to the emoluments of the office, and that his right to the office is qualified in its nature and is subservient to public good; that when the office is no longer necessary the Legislature can abolish it. This doctrine was at variance with the decisions of the United States Courts and all the Courts of all the other States in the Union. Many thought it was a decision not in harmony with the genius of Republican institutions. The statement of the Chief Justice that office is an *incorporal herditament* called forth much comment, as it was held nowhere else on this side of the water that a public office was a subject of inheritance. Shortly after this decision was rendered our Court took occasion to restrict and confine it. At the December Term, 1837, of the Supreme Court the same Chief Justice who delivered the opinion in Hoke against Henderson delivered the opinion in Raleigh and Gaston Railroad Company against Davis. In that case Hoke against Henderson was insisted upon, and the Chief Justice apparently went out of his way to limit and restrict the scope of that decision. He says, speaking of that case, "There the office, a subject of property to a certain extent, was taken from one and vested in another exactly in the same state and in the same public purposes as it was held by the first. The public interest was in the service of the officer, being precisely the same with either person for the incumbent." And again, certain clerks had allowed newly elected clerks of the court to assume duties of their office. After the decision in Hoke against Henderson these clerks claimed their offices, but the same Court which had rendered the decision in Hoke against Henderson said that these old clerks had lost thir offices by a mere *non user*. A little later it was held that the doctrine of Hoke against Henderson did not protect officers of a new county in the tenure of their offices, if the Legislature saw fit to legislate them out even during the terms of their office. This was decided in Mills against Wiliams. These decisions were all rendered years ago, and they show that it was the purpose of the old Courts not to extend the doctrine of Hoke against Henderson. In more recent years the same purpose not to extend that doctrine is seen in the decisions of the Court. A Criminal Court was estabished at Wilmington, and,

during the terms of the officers, and while they were performing the duties of their offices, the General Assembly saw fit to abolish the Court and transfer its duties to the Superior Court of New Hanover County. The officers of that Court protested, but the Supreme Court held that the General Assembly had the right to legislate them out of their office during their terms, and to transfer all the duties that they had been performing to the Superior Court of New Hanover County.

A Criminal Court was set up in Wake County and a large portion of the duties of the Clerk of the Superior Court of Wake turned over to the Clerk of the Criminal Court. The Clerk of the Superior Court resisted, but the Supreme Court held that the Legislature had the right to make this transfer of his duties and emoluments. There was no extension of this doctrine during all these years, and it appeared that it had reached its ultimate limit. When the present Supreme Court was elected it was well understood that the doctrine of Hoke against Henderson only protected the tenure of an office while the office retained its identity. It was well understood that if another office was created, with larger duties, even though the office embraced the duties of the old office, this doctrine did not apply. At the first term held by the present Supreme Court two cases were decided which showed how fully the legal profession of this State was imbued with the idea that the doctrine of Hoke against Henderson did not apply when the duties or scope of the office had been enlarged by legislative enactment. There were two criminal districts created by the Legislature, one in Western North Carolina, and the other in the East; both were presided over by Judges whose terms had not expired and who were of a political faith differing from that of a majority of the Supreme Court. The General Assembly of 1895 attempted to abolish these criminal districts, and to create new districts with larger territories and with a larger jurisdiction, but including all the territory embraced in the old districts, and having all the jurisdiction of the old Courts, with additional jurisdiction. The Legislature chose men to fill the Judgeships of these new districts. The old officers resisted, and although we may assume that the old officers were Judges learned in the law, and were familiar with the jurisprudence of their native State, and were represented by able lawyers, likewise familiar with the laws of their State, and although we know these Judges desired to retain their offices, yet we were told upon this trial by Chief Justice Furches that neither they nor their counsel relied on the doctrine of Hoke against Henderson, nor even mentioned it in their argument. It appears now as if these Judges lost their Judgeships because they were not familiar with a doctrine of law which the respondents say has been for more than sixty years the recognized law of North Carolina.

The respondents claim that the decision in the case of Wood against Bellamy was an extension of the doctrine in Hoke against Henderson. I contend that such was not the case. That decision is rested expressly on the ground that the offices and duties are not changed, but that they remain the same. The only change made by the act was, the Court tells us, a change of name, and we can well understand that where the duties and functions of an office remain the same, that a trifling change in the name does not make it a new office. This is positively the only extension or recognition of the doctrine of Hoke against Henderson which the respondents made in that decision.

Prior to the first of January, 1899, the respondents not only did not extend it, but in two notable decisions, concurred in by both respondents, they announced a purpose to confine and limit its application. In Caldwell against Wilson Judge Douglas said, speaking of Hoke against Henderson: "This Court has recently had occasion to reaffirm the doctrine laid down in that oft-quoted decision, which has become too firmly established in the policy of our laws now to be questioned, but the varied and extraordinary claims made thereunder, and the fact that we are the only State in the Union recognizing the doctrine, may well cause us to pause and consider if we have not carried it to its fullest legitimate extent. It may well be doubted if the great Chief Justice himself ever contemplated the extent to which it has been carried." At the same term of Court another decision was rendered which again confined and restricted this doctrine. The Court held in Ward against Elizabeth Ctiy that the enlargement of the town limits, taking in something like one thousand more people, made Elizabeth City a new town, and deprived its officers of the protection of the doctrine in Hoke against Henderson. I respectfully contend that by these two decisions a majority of our Supreme Court, including the two respondents, almost in so many words, declared that the doctrine of Hoke against Henderson should be extended no further; and I assert that up to the first day of January, 1899, the doctrine remained as it was first enunciated in 1833. The change came in April, 1899; then the first of the office-holdng cases, arising under the Acts of the General Assembly of 1899, came before this Court. Did the respondents hold to their declaration in Caldwell against Wilson that Hoke against Henderson had been carried to its fullest legitimate extent, or did they hold, as they had in Ward against Elizabeth City, that an enlarged scope of duties or territory created a new office? Not at all; but they announced a new doctrine. They not only said that public office was private property, and that it could not be transferred during the term of an officer from him to another, but they said that an office consisted of its duties; and while any of the duties remained

to be performed by anybody, the office continued; and that the office could not be transferred from one during his term to another. I have not been able to find a precedent for this decision. If it is correct law, then not only were Judges Meares and Jones entitled to their terms of office, but Judge Cantwell was wrongfully ousted from his office years ago. This was the first great extension of the doctrine that these respondents made shortly after they had warned the public against further extension. But further extensions came quick and fast. The next decision was Wilson against Jordan. In this case there was no way to extend the doctrine of Hoke against Henderson far enough to protect the old Clerk, for there was an express and distinct act of the Legislature abolishing his office, and he had been actually out of office some days before any similar office had been created. On this occasion the respondents invoked what they call the doctrine of *in pari materia* as an adjunct to Hoke aganst Henderson, and they combined these doctrines into a system whereby they might annul the legislative will. Neither doctrine alone was sufficient; they combined them both and assumed the authority to pass upon all the acts of the Legislature, past and present, relating to the Western Criminal District, and out of that mass of legislation they practically constructed a law of their own. The doctrine of *in pari materia* means that in construing a statute, which is doubtful, the Courts shall consider all parts of the statute, and if necessary other statutes on the same subject, in order that they may arrive at the true meaning of the portions thereof about which there is doubt as to the meaning of the Legislature. In all other jurisdictions this doctrine is a means of arriving at the intention of the Legislature and of carrying that intention into effect. Here the doctrine is a means of reversing the legislative will and of defeating the legislative intentions.

This is the first case I can find wherein this doctrine has been invoked to defeat the clearly expressed will of the General Assembly. It marks a milestone in the progress the Court made in usurping the functions of the Legislature. The respondents claim that this was not the first case wherein they had to recur to that doctrine, and they say that this doctrine is upheld in both Wood against Bellamy and in Day's case. Thorough examination will show that the doctrine was not mentioned in either of these cases, nor was that principle of interpretation used. No, *in pari materia*, as we now understand it, first appeared in Wilson against Jordan. Before many months elapsed other cases came before the Court in which the old doctrine of Hoke against Henderson, and its hand-maiden *in pari materia*, were together not sufficient to effect the purposes of the respondents. The case of Abbott against Beddingfield is another milestone in the progress of the Court. There the General Assembly

had, by a plain statute, clear and explicit in its terms, nowhere doubtful, and with no room for construction, abolished the North Carolina Railroad Commission, which institution had been established by the General Assembly of 1891. The same Legislature established the North Carolina Corporation Commission, and provided a different manner of electing its members, provided different salaries, and imposed upon it the duties theretofore exercised by the Railroad Commission, and important duties in addition which the Railroad Commisson had never exercised. Here was an office differing in name, in salary, in method of election, and in duties from the old office, and here was an act of the Legislature in terms abolishing the old office, but the Court was not to be balked of its purpose. It examined the acts of the Legislature as Courts are apt to examine deeds where there is an issue of fraud. They adjudged that the office of Corporation Commissioner was the same as that of Railroad Commissioner; they adjudged that the Legislature had never intended to abolish the Railroad Commission; they declared the act creating the Corporation Commission to be a mere amendment to the act establishing the Railroad Commission passed in 1891; and to the Act of 1899, repealing the law of 1891, they gave no effect whatever. In short, they judicially repealed that act of the Legislature as they had repealed the act abolishing the Western Criminal District. The next case was White against Hill. Here they decided that the Legislature had not abolished the office of Chief Inspector of the Oyster Industry, but had merely amended that statute and given the Inspector a new name. This was their decision in spite of the fact that the new officers appointed by the General Assembly of 1899 had duties entirely different from those exercised under the Act of 1897. This course of decisions involved the Supreme Court in many seeming inconsistencies. We will notice a few. In Cuningham against Sprinkle the Court decided that the Legislature could increase the number of members of the Board of Agriculture, even though that increase was sufficient to reverse the balance of power in that Board, and to transfer the authority from one political party to another. But when it came to the case of Dortch against the Railroad, it held that an increase of the Board of Internal Improvments from three to nine should not be permitted until after the expiration of the terms of the members then in office. They go further, and extend the doctrine in Hoke against Henderson to non-lucrative offices, and they seem to overrule express decisions of the old Court by holding that school directors who surrendered their offices to the appointees of 1899 were thereafter permitted to bring their suits and get possession of the offices, notwithstanding their former abandonment. The Court cites Hoke against Henderson as its authority for this decision, but does not cite those cases

decided shortly thereafter by Chief Justice Ruffin, holding that the Clerks who had abandoned their offices could not bring suit and recover them. They hold that a Solicitor of the Superior Court, a constitutional officer, may be deprived of a portion of his district, but that a Criminal Court Solicitor can not. The expansion of this doctrine, as I said before, has all been accomplished within two years. The effect of this expansion is to protect and enlarge the powers and rights of the office-holder, and to diminish and minimize the rights and powers of the citizen. Let us remember that neither of these principles are recognized, as here interpreted, in any other Court in the world. Neither of them is mentioned in our Constitution. The only excuse in the Constitution for Hoke against Henderson is section 17, Article I, and it only after public office has been construed to be private property. The position assumed by the majority of the Supreme Court, including the respondents, is inconsistent with the safety of our institutions. If this position becomes accepted as law in this State it will be within the power of any Legislature to place the control of the most important functions of government beyond the reach of the people for an indefinite period. You have heard, Mr. President and Senators, the interpretation of this doctrine in the testimony of Judges Douglas and Montgomery. You heard them swear that, in their opinion, any General Assembly could fill any office, which is within the control of the Legislature, by appointment for a term of fifty years or for the life of the appointee. What offices are under the control of the General Assembly? Or, rather, what offices are not under the control of the General Assembly? It will be easier to name those which are not under the control than those which are. The General Assembly, the Governor, the Lieutenant-Governor, the Secretary of State, the Auditor, the Treasurer, the Attorney-General, the Superintendent of Public Instruction, the Judges and Solicitors of the Supreme and Superior Court, the Sheriffs and Coroners of the various counties. If I mistake not, every other office in the State is within the control of the General Assembly. It is true that certain county officers are provided for in Article 7, section 1 of the Constitution. That is, the Register of Deeds, Surveyor, County Commissioner and Treasurer, but in the last section of that article it is provided that the Legislature shall have full power, by statute, to modify, change and abrogate any or all of the provisions of this article and substitute others in their place, except sections 7, 9 and 13. The control of all the great institutions of the State, the Penitentiary, the Hospitals, the Department of Agriculture, the Corporation Commission, the Cities and Towns, the County government and all the officers in the county except Sheriff, Clerk of the Court, Member of the Legislature and Coroner, are under the control of

the General Assembly. The General Assembly may pass a statute and appoint to every one of these offices, the appointment to take effect at the end of the terms of the present officers. According to Judges Douglas and Montgomery, they may give to their appointees terms of fifty years or for life, and they tell us that all succeeding Legislatures will be powerless to remedy this evil. Mr. President and Senators, do you realize what this means? It means that when the General Assembly reconvenes in this city on April the 3d it may pass a statute and strip the people of their right to elect their most important officers for the term of fifty years or until the death of the incumbent selected by the General Assembly in April. They say that this can be done, notwithstanding the fact that it is a settled rule of law that one General Assembly has not the power to pass an act which will diminish the power of a succeeding Legislature to deal with the same subject; and in spite of the fact that the bill of rights declares that elections should often be held; that a frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty; that perpetuities are contrary to the genius of a free State and ought not to be allowed; and that all powers not delegated remain with the people. I think a mere statement of this proposition is enough to show that it can not remain the law of North Carolina or of any other self-governing commonwealth. But this is the doctrine that the majority of the Supreme Court, including the respondents, contend for, and which they are endeavoring to fasten upon the people of this State. If they are right we need hold only two elections for most offices during a century. An election in 1900, another in 1950, and another in the year 2000! The House of Representatives contends that this convicts the majority of the Supreme Court, including the respondents, of an attempt and purpose to encroach upon the powers of the General Assembly, to diminish its authority, and to subvert the true principles of our Constitution. They ask for a verdict upon the fifth article upon these facts. The respondents were not content with announcing abstract principals, but they have taken another step, and they have given those principles a concrete application. Having set up these idols of judicial construction, they have determined to violate, if need be, every section of the Constitution to support them. They have forced money out of the State Treasury without an appropriation by the Legislature, and in despite of an act of the Legislature forbidding it; and by means of a process in the nature of an execution against the State, which our Constitution expressly forbids. The acts, the respondents admit. They attempt to justify their acts as being legal. They have failed in their effort. Let us see how they drew the $831 out of the Treasury. They first construed the Acts of 1897 and 1899 in such a way as to

construct an act of their own, and to put that act into effect. After declaring White to be the officer entitled to execute the Act of 1899, they determined that he should be paid for his services, and I contend that every step in the procedure by which Theophilus White was paid was taken in violation of the Constitution, in violation of the statute, and in violation of the ordinary rules of procedure. It is the law that a public officer shall be sued in the county in which he resides and in which he has given bond, and that he shall not be vexed with suits brought indiscriminately against him. The Auditor and Treasurer reside in the county of Wake, yet suit was brought in the county of Perquimans. Can we imagine a reason for bringing this suit in a county so remote as the county of Perquimans? Terms of the Superior Court in the county of Wake are held as frequently, if not more frequently, than in any county in the State. Mr. White was here in Raleigh, and his attorney resided in Raleigh, and here were the Auditor and Treasurer. There was every reason, it would seem, why the suit should be brought in the county of Wake, particularly when we remember that the law so directed. Can you guess why it was not brought here? Turn to the Court calendar for the fall of 1899. You will find it in the front part of the Supreme Court Reports. You will see that the Courts of the Fourth Judicial District were held by Judge Fred. Moore (the Judge who had held that the doctrine of Hoke against Henderson did not apply in Abbott against Beddingfield). How was the case tried in Perquimans County? You will remember the case agreed was made upon the last day of November, 1899, and the Clerk of Perquimans Court tells us that no term of the Superior Court had been held in Perquimans County since the Court which began on the third Monday after the first Monday in September, which was September 25, 1899. The action was for a mandamus on a money demand, and the law required it to be returnable to term time; and the statement that there was a genuine controversy between plaintiffs and defendants (sworn to), made it an action against the State and ousted the jurisdiction of the Superior Court. The case was sent down into the East somewhere. If I remember correctly, it was sent to Washington, N. C., and a judgment came back labeled Superior Court of Perquimans County, and the judgment was for White and directing the money to be paid. Now we have the case sent out of its own district to a county where no Court is being held, and where no Court is held, but coming back within a few days, judgment signed and everything satisfactory. The case comes to the Supreme Court long after the first district has been called, but there is no trouble about it. It is given the right-of-way and is tried in the Supreme Court within less than four weeks after the summons was issued, but the decision of the Supreme Court does not come in on schedule

time. An *advisari* is taken, and it is the 22d of May, 1900, before the Supreme Court modifies and affirms Judge Starbuck's judgment. When the mandamus is to be issued we find again that the usual course of practice is not regarded. We find that the Auditor is deprived of his official discretion; he is commanded peremptorily to pass upon and audit the claim; and at the same time the Treasurer is required peremptorily and without delay to pay the claim when so audited. The respondents tell us that they did not know whether the money was in the Treasury sufficient to pay the claim or not. They relied upon an agreed statement of facts of nearly a year previous. They took none of the usual precautions, but their order was an iron clad one; and it forced the money out of the Treasury, despite the fact that the law forbid its being paid in that manner.

Let us examine now the excuses made for the conduct of the respondents.

NOT NECESSARY TO PROVE CORRUPTION.

It is said that they had no corrupt or personal interest in this fund. We cheerfully acquit them of that. We never have contended that they had the slightest interest in the matter, or that there was upon them the slightest taint of personal corruption. Under our law that is not necessary. We have charged them with certain acts, made by the law of North Carolina impeachable offences. The Constitution of this State did not undertake to name all the offences which are impeachable. Those offences are named by statute; and the first of the classes of offences for which officers may be impeached is corruption "or other misconduct in their official capacity." We have not charged corruption; but we do charge misconduct in their official capacity. And we insist that evidence has overwhelmingly proven this charge.

The Constitution of our State differs from the Constitution of the United States. The National Constitution names all the offences for which an officer of the United States Government may be impeached; they are treason, bribery or other high crimes and misdemeanors. The authorities cited by the counsel for the defendants are all decisions rendered upon this section of the Constitution of the United States. The Constitution of North Carolina is different. It goes no further than to set up a Court of Impeachment. It leaves the offences punishable by impeachment to be named by statute. That statute is section 2937 of The Code; and among the other offences punishable by impeachment are "corruption or other misconduct in his official capacity." The words of this statute are almost the exact words of the Constitution of Louisiana on that subject; and we have a recent very strong decision of the Supreme

Court of that State interpreting those words. I read from the decision of State against Lazarus, Louisiana Annual Reports, page 160: "The contention of the defense that the malfeasance or nonfeasance or gross misconduct charged must, as a condition to removal, be proved to be criminal or corrupt is manifestly erroneous. It is absolutely untenable either in reason or on authority. It is answered by the mere fact that in the Constitution the contemplated causes of removal are disjunctively connected." The causes for impeachment, set out in our statute, are likewise disjunctively connected; and, therefore, the misconduct in office need not be of a corrupt or dishonest nature. If such conduct were necessary neither President Johnson, Governor Holden, nor any of the Judges whose impeachment trials we have been studying so recently, were liable to impeachment. The statute means what it says. It means that if a public officer is guilty of corruption in office he may be impeached; and it means, further, that if a public officer is guilty of misconduct in his official capacity he may be impeached.

INTENT.

The next defense made for the respondents is that we must prove that when they did the unlawful act they had a guilty intent. I admit that we must prove a partisan intent to convict on Article 5, but not on those relating to the mandamus. It is a well-settled rule that where the doing of an act is made unlawful, the intent to do that act is the guilty intent; notwithstanding the fact that the person doing the act may have honestly believed he was acting within his right, and had no purpose to violate the law. This is the well-settled law of our State. It has been ably enforced by Judge Bynum when he was Solicitor of the Fifth District; and the convictions which he secured were upheld by the Supreme Court by decisions in which the respondents both concurred.

In the Hatch case from Chatham County, Judge Bynum prosecuted and secured the conviction of members of the Board of County Commissioners of a criminal offence, because they had negligently allowed some shingles belonging to the county to be sold for less than they were worth. It was admitted that the act of the Commissioners was one of negligence, and that they had no corrupt purpose or criminal intent; but the Supreme Court pronounced them guilty of a criminal violation of the law, notwithstanding their good intentions.

In the cemetery case from Burlington, Judge Bynum again prosecuted and secured the conviction of certain officers of that town. They were charged with felony, in that, as officers of the town, they directed certain bodies to be removed from the town cemetery, where they had been interred, to another plot of ground, where

they were again decently buried. It was not contended that the officers of the town of Burlington were not acting as they believed they had a right to act; and it was not contended that they were not acting within what they honestly thought was their official duty. They were endeavoring to enforce an ordinance of their town; yet, because the act done by them was an unlawful act, the jury convicted them, and the Supreme Court upheld the verdict and judgment.

This is the law of North Carolina, as pronounced by the respondents and their counsel. In matters involving the characters and liberties of citizens they have interpreted the law as it is written in the books; and they have interpreted it, no doubt, correctly, even if it seemed a little harsh. Now when they are before the Court to answer for a violation of the law, it is asserted that we must prove them guilty of corruption; and prove that they acted with a criminal intent. Mr. Osborne says that if we do not allow them this defense we will be acting with such cruelty as he would not be guilty of, if he were trying a dog. I will not bandy epithets, but I only remind you, Senators, that you are sworn to execute the law as you find it. That law has been interpreted in unmistakable terms by our own Supreme Court. If the law is harsh, it is their law; and they have enforced it against the citizens of this State. They can not complain if the law is now enforced against them. Sacred writ admonishes us that "with what judgment ye judge ye shall be judged, and what measure ye meet it shall be measured unto ye again." If the officers of Chatham County were tried and convicted of a criminal offense and their convictions upheld by the respondents when they had no corrupt or guilty intent, and if the officers of Burlington were convicted and their convictions upheld by this Court when they had no corrupt or guilty intent, then surely the law is too well settled for you to allow the respondents a defense which they refused to other men.

JUDGES NOT LIABLE TO SUIT OR INDICTMENT, BUT IMPEACHABLE.

A large part of Judge Bynum's speech was an effort to show that Judges were not liable for their official acts. He read elaborately from decisons to that effect; he read much law that was good law, but not applicable to a trial like ours. If the Treasurer had brought suit against the Judges for damages for being required to pay out money unlawfully from the State Treasury, then the law that Judge Bynum read would have been applicable, and his contention that the Judges were not liable, civilly or criminally, for their acts done in their official capacity would have been sustained by his authorities. If Hill and the Shell-Fish Commissioners had brought suit

against the respondents for a false judgment in having taken their offices away from them, the decisions he read would have been applicable, and his positon would have been impregnable Nothing is clearer than that the Judges can not be sued or prosecuted in the ordinary courts for their official acts. He read from the case of Yates against Lansing, Johnson's Reports, Volume 5, page 198 Here the suit was brought against the defendant, the Chancellor of the State, to recover the penalty of $1,250 for an act done in his official capacity. The opinion is a long one and was delivered by Chief Justice Kent. He decides that the action can not be maintained. He says that "the doctrine which holds a Judge exempt from a civil suit or indictment for an act done or omitted to be done by him sitting as Judge has deep root in the common law." He quotes from Sergeant Hawkins as follows: "The law has freed the Judges of all courts of record from all prosecutions whatsoever, except in the Parliament, for anything done by them openly in such courts as Judges." You will note that the exception that the Sergeant means is that the Judge can not be prosecuted in any manner whatsoever except by Parliament. This not only is not an authority in favor of the respondents, but it is a direct statement that, while Judges can not be prosecuted or sued for offenses committed by them while acting as Judges, they are liable to impeachment by Parliament. Further on, on page 296, Chief Justice Kent says that the act which Judge Lansing had committed could not be the subject for a suit for a penalty, nor could it be made the basis for an indictment; but he says, "It would be an impeachable offense which can never be avenged or shown but under the process of impeachment." If the Judges are not responsible to a Court of Impeachment, pray tell me to what Court they are responsible? The authorities hold that they may not be indicted for their official acts, nor may they be sued by the parties injured thereby. All the authorities hold that for their offenses, for their misconduct, and for their derelictions of duty they are answerable to Parliament in trials for impeachment. This is the only liability for which we contend, and we contend that it is a liability the respondents can not escape.

INDEPENDENCE OF THE JUDICIARY.

The next plea set up for the respondents is that the House of Representatives, by presenting these articles of impeachment, infringes upon the powers of the Judiciary and seeks to destroy its independence. If this is true, Mr. President and Senators, the House of Representatives has committed a most grievous offense. Nothing is more important to the preservation of our liberties than to preserve inviolate the independence of the Judiciary; no greater calamity

could come to our country than for the Judiciary to lose its independence in its own sphere and to become a mere servile creature of either the Executive or the Legislature. No man that loves his country wishes to see the time come when Judges will not be independent; but we must remember that Judges are human, and that the human being has yet to be born who is without faults or who can safely be trusted with limitless power. Our Constitution has wisely provided that neither of the three branches of our Government shall be paramount; each shall be independent in its own proper sphere of the others. Separate in its own sphere, mutually interdependent, they form a perfect system. Neither shall overstep the bounds of its own peculiar province. If it does, it must be required to step back and confine itself to its department, otherwise the most grasping department will be allowed to dwarf the others, and our Constitution will fail. It is well known that when the Legislature oversteps its bounds its acts become null; when the Executive exceeds his power he becomes impeachable, and the judgment of the law is swiftly visited upon him. Now, shall it be contended that the Judiciary shall be allowed to usurp the functions of other coordinate branches of the Government? If so, we will have a government, not of three coordinate branches, each supreme in its own department, but we will have one department paramount, and the others wholly subservient, and existing only at the will and sufferance of the paramount authority. I contend, Mr. President, that this defense has no application to the case at bar. If the Judges have not violated the law, then they should be acquitted; but if they have violated the law, then you should not fail to convict be cause of the plea that such a conviction would destroy the independence of the Judiciary or minimize its authority. The Judiciary of England was not degraded, but was rather exalted when the infamous courts known as The Court of High Commission and the Council of York were abolished and their officials punished. The office of Governor of North Carolina was not degraded because of the impeachment and removal of William Woods Holden, but it was rather exalted when the world saw that a Governor was not above the law. If these Judges are guilty, your conviction of them will not diminish the authority of the Judiciary; it will not humble or subdue the righteous Judge who wishes to uphold the Constitution and enforce the law.

All that we ask of the Supreme Court is that it do not transcend its own constitutional limitation. We would not, if we could, deprive it of a single power, nor diminish in the slightest degree the respect which is its due; but we do ask that it accord the same liberty and respect, within their respective provinces, to the other coordinate branches of the Government, which it demands for its

itself. In this State neither of the three branches of the Government is paramount. They are coordinate, equal, independent and separate. If it is so great an offense to ask that the Judiciary remain within its proper sphere, what must be the act of the Judiciary when it has usurped powers belonging only to the General Assembly? Our Government is not one of an executive, nor yet is it legislative, nor judicial. It is a government of the people administered under forms of written law. The policy of the Supreme Court for the last two years seems to have for its purpose to make the Judiciary supreme, and to dwarf the legislative department. Mr. President and Senators, be not deceived by the charge that the dignity or independence of the Judiciary is at stake. That is not the question. No person attacks their independence; no person has attacked their dignity, but the dignity and the rights of the General Assembly are at issue in this trial. The people are determined that their Judiciary shall be independent of every restraint save one: but of one restraint it shall not be independent, and that is the obligation upon the Court to regard and obey and enforce the laws. Let the Courts know that so long as they obey the Constitution and laws of the land and their oaths of office, they shall not be amenable to any earthly power; but let them know also that no man nor thing, no officer, no Governor and no Judge in this State is or shall be above the law.

HOKE V. HENDERSON NOT ATTACKED.

The defendants charge that we are attacking the doctrine of Hoke against Henderson. We do no such thing. For the purposes of this argument we admit it to have been good law when delivered, and good law now. What we contend is that the recent office decisions of the Supreme Court are not justified by that decision; they are not in line with it; and in many respects they are totally repugnant to this reasoning. Be not disturbed by the contention that we are attacking Hoke against Henderson; such is not the case. We are attacking the perversion of that doctrine.

RIGHT TO DECLARE LAWS UNCONSTITUTIONAL NOT DENIED.

The defense alleges that this prosecution is, in effect, an assertion that the Supreme Court has not the power to declare acts of the General Assembly unconstitutional. Such a contention has never entered into our minds. We assert that one of the undoubted prerogatives and one of the highest duties of the Courts is to pass upon the constitutionality of the acts of the General Assembly, and when such acts are antagonistic to the Constitution it is their duty to so declare. If that were not true, the very proposition that we contend for would fail. The theory of this prosecution is that the

three coordinate branches of the Government are distinct, independent of each other and equal in authority in the proper sphere of each. Now, if the Courts must take and enforce every act which the Legislature enacts, it is manifest that the Legislature becomes supreme, and the theory that the three departments are equal, independent and coordinate falls to the ground. No, Senators, we have made no such contention. This argument is a mere phantasma conjured up by the defense to frighten you or to discredit the prosecution.

I will briefly notice one or two other contentions which the defense has made and hasten to a conclusion. The defense says that this prosecution will not stand because the case of White against the Auditor and Treasurer was not a suit against the State. If it was not a suit against the State, pray tell me what it was? The action was brought against two State officers having control of the expenditures of the State, and against them in their official capacity. The result of the suit was that money was paid out of the State Treasury. What element was lacking to make this a case against the State? In a recent case decided in the Supreme Court of the United States, Smith against Reeves, 178 United States Supreme Court Reports, page 439, Justice Harlan asks this question: "Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party-defendant, the suit is against one of its officers as Treasurer; the relief sought is a judgment against that officer in his official capacity; and that judgment would compel him to pay out of the public funds in the Treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint "

The cases on this point are numerous and uniform. I only trouble you with this case because it is the most recent one reported from the Supreme Court of the United States. It is clear, explicit, and, it seems to me, decisive.

UNLAWFUL INTENT NOT NECESSARY TO A CONVICTION ON THE FIRST, BUT NECESSARY ON THE FIFTH ARTICLE.

Much has been said, Mr. President and Senators, upon the question whether a guilty intent was necessary to a conviction of the respondents. It seems to me it is not a question about which there can be controversy. If the Constitution, in so many words, forbids a thing, and the thing is done, the intent to do the thing is the guilty intent, and we have only to prove that the respondents did an act expressly forbidden by the Constitution. Such act is charged in Article 1 of this impeachment. If the respondents did the act

set out in this article, the only intent which is necessary is the intent to do the act; that is, the intent to issue the mandamus. That they had his intent no one denies, least of all themselves. That is expressly admitted. I submit, therefore, that having admitted that the act done, was not done under duress, and was not done accidentally, we need not trouble further about the intent as to this article. They depend merely upon whether the defendants did the acts charged against them; and upon whether the acts done were in violation of the Constitution. If so, they are guilty. This is the law of North Carolina as interpreted by the respondents.

But as to the fifth article, I think the rule is different. Here the respondents are not charged with violating specific articles of the Constitution; but they are charged with entering upon a systematic scheme of defeating the legislative will for partisan purposes. It is charged that they went about this in a specious manner, and placed false constructions upon former adjudications of the Court.

Now I will admit that if these decisions in the office cases were rendered honestly, believing they were the law, although it might not have been, and that their erroneous decisions were the result of honest mistake, then the respondents can not be convicted under Article 5. I concede that before we can ask you to convict under Article 5 we must satisfy you from the conduct of the Court and from the manner of their decisions, beginning with Day's case, that they had a partisan purpose and desired to thwart the legislative will and to annul its laws. We contend that they had this purpose. We contend that this purpose is conclusively shown by the contrast between their decisions during the period when they were in harmony, politically, with the Legislature, and the period since that harmony has been broken. This contrast can hardly be shown plainer, than when they interpreted, in Ward against Elizabeth City, an act of the Legislature of 1895, and when, in Abbott against Beddingfield, they interpreted an act of the Legislature of 1899. It is plain that it was to the interest, politically, of the party to which the respondents belong to annul, as far as possible, the legislation of 1899. It was to the interest of that party to bring the Legislature into disrepute, and to weaken the confidence of the people in its work. Here was the motive; here were the persons interested, and here is the act done. We contend that this is proof plenary.

THE MANDAMUS UNLAWFUL.

I have heretofore discussed the mandamus in White against Auditor as an incident—as the culmination of a scheme begun in the Day case. Before you can convict respondents of that scheme, I have conceded that we must convict them of a partisan motive; but, as to the issue of the mandamus, motive is not necessary. If

they had no right to issue the mandamus they are guilty. Did they have the right? They did not unless there was then in existence an act of the Legislature appropriating the money to the payment of White's salary. There had been such an appropriation, we admit. The respondents admit that the Legislature had the authority to withdraw the appropriations or to annex conditions to it. Now, the guilt of the respondents as to the mandamus depends on whether the Legislature of 1899 withdrew this appropriation. We say it did do so by chapter 21, and again expressed its withdrawal by the resolution of June, 1900. Chapter 21, Laws of 1899, provided that no payment should be made except to those authorized by chapter 19, Laws 1899, to perform the services. This act named Hill and his associates as the persons to perform the service. It is admitted that the Legislature had the power to withdraw. It certainly exercised these powers.

There are some appropriations for salaries which the Legislature can not withdraw. The salaries of the Judges and certain other officers are provided by the Constitution to this extent; when once fixed by the Legislature they can not be diminished during the term. In effect when once fixed by the Legislature the Constitution continues the appropriation during the term. But White's office was purely legislative. Its continuance as to duties and payment of salary depended on the legislative will. The Legislature could withdraw the appropriation when it saw fit. It did so. Its right is admitted by the respondents, and is so held in many cases—especially in Shaffer against Jenkins. This left (admitting that the office was not abolished) White with an office, but with no appropriation to pay his salary. The Constitution says no money shall be drawn from the Treasury except by virtue of appropriations made by law. The respondents say, in Garner against Worth, that no matter how just and honest a demand may be on the State for services, no payment can be made unless the Legislature shall have made an appropriation for that purpose.

A plain prohibition of the Constitution was violated when the respondents ordered (in the opinion or in conference verbally, I care not which) the peremptory mandamus to issue. They did an act forbidden by law, and pronounced by them to be illegal before in Garner against Worth. In that case they laid down a rule of strict construction They sinned against light and knowledge. They can not say their motives for violating the Constitution were good. They did the act. They are guilty. The House demands judgment.

The mandamus was unlawful unless an appropriation had been made to pay White's salary. It was unlawful if an appropriation had been made and then withdrawn. It was unlawful if an appropriation had been made and not withdrawn, but fettered with such

conditions as deprived White of the benefit of it. I will read the cases which I think establish this doctrine and show that the Legislature had the power to withdraw an appropriation, even from a special fund, or to fetter that appropriation of a special fund with conditions which would deprive the claimant, even a rightful claimant, of the benefit of the appropriation.

The following are the cases: State of Missouri v. Seligman, 50 Missouri Reports, page 34; Western v. Dane, 51 Maine, page 461; Mauran v. Smith, 7 Rhode Island Reports, 192; Garner v. Worth, 122 N. C., page 250, especially on page 258.

POLITICAL INFLUENCE.

Mr. Busbee charged that the prosecution was influenced by political motives and political necessity and was being pressed by political influence. This is a grave charge, if true. In a sense, every impeachment trial is a political measure. The proceeding is essentially political in its nature. Its purpose is to remove from the body politic a public and political evil. In that sense, every impeachment trial may be said to be political. If this is the sense in which Mr. Busbee used that language, there is no objection to it; it would be a mere statement of an elementary fact, and it would indicate that he wished to point out the difference between an impeachment trial, intendng to remedy a political evil, from an ordinary trial at law where private rights are litigated. But I apprehend that Mr. Busbee, forgetting the proprieties of the occasion, did not intend his language to have this meaning, but he intended to say that the members of the House of Representatives, acting in their official capacities, and bound by their oaths of office, had preferred this charge against the respondents, not because they believed the charges to be true, but because they thought they and their party might gain political advantage thereby, and that the prosecution is now being pressed by somebody, not from good motives, but for the purpose of gaining political advantage. Such a charge has not been brought publicly, to my knowledge, in this State, since the trial of Governor Holden. It was urged there almost in the language Mr. Busbee uses now. May we ask Mr. Busbee for the proofs whereupon he makes this charge? On Saturday you, Mr. President, admonished Mr. Busbee to keep within the record. May I ask you, Senators, now to name a scintilla of evidence which will justify Mr. Busbee's remark? I see men of the same political party, here and elsewhere, differing upon this question, and if I know the purposes of the Managers and of their counsel, it is to present the evidence and the law before you as we would in the ordinary courts of justice. When he says that party influence is being brought to bear

to secure the conviction of these respondents, he states what he ought to have proven during the trial if it existed, and having failed to prove which, he must not now allege. I venture this prediction, Mr. President and Senators, that the only political party which will show a division of sentiment on this question will be the party with which the Managers affiliate, and that the other two parties will vote on political lines. Mr. Busbee makes too low an estimate of humanity when he charges that the House of Representatives was actuated by sinister motives in presentng these Articles of Impeachment. He has made a statement which will not stand the test, and one which, no doubt, he is already ashamed of having made. On Saturday Mr. Busbee argued that the majority in the House was made up of men inspired by a political and a bad motive. On Monday he withdraws that accusation and says they were swept off their feet by Mr. Craig's speech. In short, on Saturday he charged that they were bad men. On Monday he charges them with being weak, emotional men. On which occasion he intended to be the more complimentary I can not say.

Our friends on the other side have not only introduced politics into this discussion, but they have introduced personalities also. They have gone out of the record to attack members of the House, to attack the House of Representatives itself, the members of the Board of Managers and counsel on our side. They gravely argued that I appeared before Judge Robinson in October, 1897, and asked for a mandamus on the Treasurer in the case of Garner against Worth. Now, there was not a scintilla of evidence to this effect, and I am willing to state to you that there is not a scintilla of foundation for the statement. As a matter of fact, I did not at that time know that there was such a case upon the docket in any Court, and had nothing more to do with it, Mr. President, than you did. I was not then a member of the firm of Simmons, Pou & Ward; in fact, that firm was not formed until the January succeeding, and the only connection that I had with that case was that my name was marked when the case went to the Supreme Court. The Supreme Court decided correctly, I think, that it would require a special appropriation to pay those claims, and that such an appropriation had not been made. If the Supreme Court had stood by that decision, much trouble would have been averted and our Constitution would not have been violated. No matter who argued Worth against Garner, we contend that the decision in that case was good law and that the error that the respondents made was when they departed from the principles which they had enunciated in that case.

They then charge that I had been of counsel for Governor Russell, a statement wholly without foundation. I have represented the Corporation Commission and the Board of Agriculture in a

number of important cases, but I have not had the good fortune to represent the Governor in any case. I think, however, that any patriotic lawyer should be ready to appear for his State whenever its interests are involved when requested to do so by the Governor, and I am free to say that had Governor Russell thought my services would have been useful to the State in the trial of any great cause and had called upon me to defend my State, I should not have refused. But, as a fact, he did not do so.

Then they charge Major Guthrie with having belonged to all political parties, of having voted for the respondents, and being now without a party, standing alone, a political orphan. Major Guthrie needs no defense at my hands, but I can not resist saying in public what I have often said in private, that Major Guthrie is the one citizen of our State who owes allegiance to no party. He does not allow any party to decide for him questions of right or wrong, or questions of public policy. He decides those questions for himself and he performs each political duty as to him seems best. He does not permit his conduct to be governed by the past, nor does he swerve from what he believes to be the path of duty for what he fears may happen in the future. But without regard to the past and without endeavoring to peer into the future, he performs each political duty as he comes to it, without fear or favor, without reward and without the hope of reward. I know the man, and when I consider that his life has been an open book, when I consider the patriotism of his motives, the loftiness of his life, the transparent honesty of his purpose, I wish that North Carolina contained, instead of one, a hundred thousand William A. Guthries.

THE GENERAL ASSEMBLY OF 1899.

Much has been said, in this argument and elsewhere, about the Legislature of 1899. It has been charged that it was careless, negligent, grasping after office, that it was incompetent and could not make its laws effective; that it was constantly meeting and adjourning again, almost to the very limit of its existence. Have you ever considered, Mr. President and Senators, that the frequent meetings of the General Assembly, and the fact that it feared to adjourn *sine die*, furnishes abundant proof that the people and the Legislature had lost confidence in the Supreme Court. Here were members of the Legislature, many of them poor men, coming to Raleigh three separate times, without pay or mileage, in order that they might stand guard over the people's rights. Had that ever been done in the State before? Why was it done? It was done because the people believed, and the General Assembly believed, that if it adjourned *sine die*, the Supreme Court, including the respondents, would annihiliate its work. The Supreme Court remained in session last

spring to a later date than had ever been known before, and it did not adjourn until after the Legislature met and decided that it would not adjourn *sine die* until after the 20th of July. Then the Supreme Court adjourned. What its purpose was in having so prolonged its session I do not know, but the fact is that, having studied the decisions of the Court for twelve months, the representatives of the people believed that that Court had a sinister purpose in view. Now, Mr. President and Senators, the respondents and their friends will laugh at the General Assembly of 1899. They may count the number of its laws which the respondents have annulled; they may hold it up to ridicule as much as they please. They are welcome to such merriment as they may derive from such a course. The work of that General Assembly is done. It will be judged by time and posterity, and I do not hesitate to make the prediction that future generations will look to it as the Englishman looks to the Long Parliament. It is the one General Assembly in this generation which has stood between the people of this State and a hostile Executive and a hostile Judiciary. A grateful people will not allow the criticisms of that Court nor its ridicule to sully the fair name of that General Assembly, nor to lessen the love, respect and admiration in which it is held, and will ever be held by the best people of this State. It has done its work *Esto perpetua.*

Now, Senators, I have finished my argument, and I will say but a word more to you. This responsibility is on you. You would have avoided it if you could, but you could not. It has been placed upon you by the House of Representatives, and like brave men you will meet that responsibility. The House of Representatives had a discretion in this matter. You have none. The House of Representatives might have considered the violations of the Constitution and laws committed by the respondents, and excused and condoned them. The House might have concluded that the respondents would be removed from the bench by the suffrages of the people before irreparable damages to our Constitution had been wrought. The House is not compelled to exhibit articles against every public officer who is guilty of misconduct. It usually exhibits articles against only those public officers whose misconduct in office constitutes a public danger. The House has adjudged this to be one of those cases, and it has come before you in the regular way for your decision. None of these considerations can now affect you. You do not decide whether these accusations ought or ought not have been brought; you do not pass upon the question whether it might not have been more expedient to have condoned the acts of the Judges. You pass upon the question whether the respondents be guilty or innocent of the articles exhibited against them. Let me say further, Senators, that if you acquit these Judges, you sanction the acts

wherewith they are charged. We have alleged that these Judges have practically re-written our Constitution and made it speak a different language from what the written words of that instrument have heretofore spoken. We say they have changed the Bill of Rights. They have made Article I speak as folllows: "The Legislative, Executive and Supreme Judicial powers of the Government ought to be forever separate and distinct from each other, but the Judiciary shall be paramount." Section 9 of that article they have practically stricken out, because they have exercised the power of suspending laws, whereas this article provides that laws shall never be suspended. Sections 28, 29, 30 and 31 they have made useless, because elections need not be frequent, nor recurrence frequently had to fundamental principles nor hereditary emoluments or perpetuities forbidden when officers may be appointed to almost all the important offices of the State for a term of fifty years, and be safe from legislative removal. Article IV, section 9 they have made to read as follows: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory. No process in the nature of execution shall issue thereon. They shall be reported to the next session of the General Assembly for its action, but the Supreme Court may issue process in the nature of execution for the salary of public officers." Article XIV, section 3, they have made to read in effect as follows: "No money shall be drawn from the Treasury but in consequence of appropriations made by law, unless ordered by the Supreme Court, and an accurate account of the receipts and expenditures of the public money sh all be annually published." It is with you to say, Senators, whether the interpretation put upon our Constitution by these respondents shall remain the law of the land, or whether we will restore the instrument as it was formed by the fathers. If you fail to convict the respondents, you can not be heard hereafter to say that their construction of the Constitution was wrong; but from the day that they walk out of this Court exonerated and again take their place upon the Supreme Court bench, the interpretation which they have given to the Constitution becomes fast and permanent. Therefore, you shall decide whether these great safeguards that have been written into the Constitution by the wisdom of the founders of our Commonwealth shall remain, or whether they shall be destroyed by these modern absurdities, the doctrine of Hoke against Henderson and the doctrine of *in pari materia*. For your verdict you are answerable to your conscience, and from a true verdict, as brave and true men, you will not allow sympathy or friendship or anything else to swerve you

Mr. President and Senators, I have not read to you from the books. I have endeavored to spare your time; and instead of read-

ing all the authorities during my argument, I have prepared a brief in which I cite them all and quote freely from them. I ask the privilege of filing this brief and of placing a copy on the desk of each Senator. I ask you to give to the brief such consideration as the demands upon your time permit.

(Leave to file brief is granteed and the same is filed.)

NOTE.—Mr. C. M. Cook failed to furnish copy of his speech, and Mr. Jarvis answered request for copy of his speech as follows:

GREENVILLE, N. C., April 16, 1903.

A. J. MAXWELL, ESQ., *Clerk Senate, Raleigh, N. C.*

MY DEAR SIR:—In reply to yours of recent date, requesting a copy of my speech, in behalf of the respondents, in the impeachment trial, I beg to say it is not practicable to comply with your request. I did not have a written speech. I spoke from a few notes of some of the points I wished to present, and these are worthless now. It would not, therefore, be possible for me to reproduce the speech I actually delivered and I ought not to substitute another.

On account of my disabled arm I seldom write a speech. I have accustomed myself to speak from notes or careful mental preparation. I simply followed my usual custom, in this matter, in the impeachment trial.

I am truly yours, THOS. J. JARVIS.

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